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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO

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VOLUME IV

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1874

JUDGES
OF THE
SUPREME COURT OF OHIO,

DURING THE TIME EMBRACED IN THIS VOLUME.

HON. ALLEN G. THURMAN, *Chief Justice.*

**HON. RUFUS P. RANNEY,
HON. THOMAS W. BARTLEY,
HON. JOSEPH R. SWAN,
HON. WILLIAM KENNON,** } *Judges.*

**ATTORNEY GENERAL,
GEORGE W. MCCOOK.**

(ii.)

6-29-1858

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO,

DECEMBER TERM, 1854.

PRESENT:

HON. ALLEN G. THURMAN, CHIEF JUSTICE.	
HON. RUFUS P. RANNEY,	
HON. THOMAS W. BARTLEY,	} JUDGES.
HON. JOSEPH R. SWAN,	
HON. WILLIAM KENNON,	

HEIRS OF ISRAEL LUDLOW v. DEVISEES OF DANIEL C. COOPER.

A partnership may exist in the purchase and sale of real estate.

When the parties to such partnership agree that the real estate so purchased shall be considered personal property, it will be so considered and held in a court of equity.

In such case, a settlement of the partnership concerns by the administrator of the deceased partner and the surviving partner, by which the administrator of the deceased partner relinquishes all claim to the real estate, is binding on the heirs of the deceased partner, especially if made before the surviving partner acquires the legal title to such real estate.

[Where the administrator of a vendee of real estate, in good faith, and when it might reasonably be considered for the interest of the heirs of the vendee to do so, rescinds an executory contract with the vendor, a court of equity will not, after the lapse of many years, disturb the contract of rescission on the application of the heirs.

Heirs of Ludlow v. Cooper's Devisees.

2] *BILL of review, filed in the old Supreme Court, in Montgomery county; reserved for decision in the old Supreme Court in bank.

A sufficient statement of the case appears in the opinion of the court.

H. H. Hunter, T. Ewing, N. H. Swayne, for complainants.

P. Hitchcock, H. Stanbery, Swan & Andrews, for defendants.

KENNON, J. This case stands upon a bill of review filed June 16, 1848, and an amended and supplemental bill filed November 7, 1848, in the Supreme Court of Montgomery county.

The original case was a bill filed by Ludlow's heirs v. Letitia C. Cooper and others, claiming title to land through Daniel C. Cooper.

The bill claimed that the ancestor of complainants owned the undivided half of a large quantity of land, lying in and about the town of Dayton; that the strict legal title being in Cooper, he had sold and conveyed a portion of the same in his lifetime; that the residue of the land was held in trust by the defendants for complainants. The bill prayed an account of the proceeds of the lands sold, and a conveyance of a moiety of the land unsold.

Upon a final hearing of the case in the Supreme Court in bank, at the December term, 1843, the bill was dismissed.

The bill now filed claims that the court erred in dismissing the bill; that the decree should be reversed on that account; that since the final hearing the complainants have discovered new and material evidence, which would have changed the aspect of the case on the original hearing, and would have entitled the complainants to a decree.

The first question to be determined is, whether the court in bank, upon the evidence before it, should have rendered a decree for the complainants instead of dismissing the original bill. In determining this question, we have looked into all the evidence with care, in order to see whether the Supreme Court was justified, upon the facts of the case, in making the final decree.

3] *To understand more clearly the case, it may be useful to state that the original bill avers, that some time prior to or about the year 1801, Daniel C. Cooper, late of Dayton, in Montgomery county, now deceased, purchased from the United States (including certain pre-emption rights of individuals) a large quantity of land,

Heirs of Ludlow v. Cooper's Devisees.

near to and adjoining the present town of Dayton, amounting to more than three thousand acres, and being the same land referred to in the written agreement thereafter set forth. That shortly after making the said purchase, and before making any payments thereon, said Cooper entered into a verbal agreement with said Israel Ludlow, the substance of which was, that said Ludlow was to pay one-half of the purchase money and expenses, and be equally interested with the said Cooper in all the said lands, except certain tracts specified in the written agreement; that in pursuance of said verbal agreement, said Cooper and Ludlow proceeded to make improvements and dispose of lots by donation and sale, and to do divers other acts of ownership; in all of which said Ludlow participated as joint proprietor with said Cooper, although the business was chiefly transacted by said Cooper, he having made the purchase originally, and residing at Dayton; that petitioners are unable to state the exact amount of purchase money advanced by said Ludlow, but are informed and believe that he advanced more than his half, and thus brought the said Cooper largely indebted to him; that afterward Cooper and Ludlow entered into a written agreement, of which the following is a copy:

"Whereas, I, Daniel C. Cooper, of the town of Dayton, in the county of Montgomery, have purchased of the United States certain lands in the 7th range of townships, near to and including the town of Dayton, in the Miami Purchase, as may appear by the register's and receiver's office, and have also procured of the commissioners certain certificates of rights of pre-emption in the 7th and 8th ranges as aforesaid; now know ye, that I, the said Daniel C. Cooper, for the consideration hereafter named, hath granted, bargained, and sold, and by these presents doth *grant, bargain, [4 and sell, to Israel Ludlow, of Hamilton county, an equal moiety or half part of all said tracts purchased as aforesaid, or certificates taken as aforesaid, excepting and reserving the following tracts and town lots, viz: town lots Nos. 1, 2 and the fraction in front, 12, 63, 61, 65, and 66; also, all the lands east of Mill street, and north of them on the Main street, heading up Mad river, for the use of the mills; also, fractions No. 2, first town, and the east quarter of section No. 24, and fraction 23, and section 32, second town, and seventh range, and all the lots which settlers were entitled to by virtue of their first settlement.

"The said Israel Ludlow, for the consideration of the aforesaid

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grant, doth agree to pay one equal half part or moiety of the purchase money for the aforesaid tracts, purchased as aforesaid, excepting for the aforesaid excepted tracts. The said parties are to be equal in all advances toward the purchase money, as also in the proceeds of sale of said lands or any part of them," etc.

Signed by the parties and dated December 13, 1803

It is further stated, that at the time of the contract a large part of the purchase money had been paid, partly from advances made by Ludlow, and partly by proceeds of sales of lots, and that shortly after the balance was paid by the proceeds of sales; but complainants can not state the dates or the amounts of the several payments. That on January 24, 1804, Israel Ludlow died, leaving heirs, James C. Ludlow, Sarah Bella Ludlow, and Martha C. Ludlow, infants, the eldest not exceeding six years of age, and Israel L. Ludlow, born after his death. That after the death of Ludlow, Cooper procured patents for all the lands in his own name in severalty; and continued to make sales until in 1818, when he died testate, making Joseph H. Crane, Horatio G. Phillips, and James Steel, his executors, and devising his whole estate to his two sons, David Z. and Daniel C. Cooper. Daniel C. Cooper, the younger, afterward died 5] intestate, leaving *his brother David Z. his sole heir at law. Subsequently, in 1837, David Z. died testate, making Alexander Grimes and Edward W. Lewis his executors, and devising all his estate to his wife, Letitia C. Cooper. The executor of Daniel C. Cooper, the executors of David Z. Cooper, his widow Letitia C., and others, are made defendants.

Complainants further charge, that no part of the proceeds of the sale of said land, so far as the same was sold, were received by their ancestor during his life, nor by themselves since his death, nor has any part of the land been conveyed to him or them, nor any account rendered. And they allege that they would long since have applied for relief, but they had no knowledge of the written agreement, the same having been mislaid or lost, a great length of time, and only discovered a few months before the commencement of the suit, among the papers of their ancestor.

The defendants are called upon to answer under oath, and the prayer of the bill is that the defendants may be decreed to pay such balance as may be found due on accounting, and to convey an undivided half of the lands left unsold.

After the bill was filed, and before the hearing, there was a

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considerable change of parties, by death, intermarriage, and otherwise.

Several of the defendants disclaim, others answer:

Those who answer, deny from information and belief nearly every material allegation in the bill, except the execution of the written agreement, dated the 13th of December, 1803; and so far as that agreement is concerned, it is claimed that Ludlow died about a month after the execution of the contract, and that neither he, in his lifetime, nor his administrators or heirs after his death, paid anything on the contract; that the bill is to be considered as a bill for the specific performance of a contract; that the lapse of time bars all the equity of the complainants; that they are barred by the statute of limitations, and that the *contract was re- [6
scinded by Cooper and the administrators of Ludlow.

The Supreme Court in bank found, from the facts in the case, that Ludlow did not, in his lifetime, advance any money on the first installment, nor did his representatives since his decease pay any money to Cooper on the contract; that the first payment on the land had been made by Cooper in 1801, before the contract in writing was entered into; that the other payments became due on the successive last days of December, 1803, 1804, and 1805, but were not made until 1813, to which time credits had been extended by successive acts of Congress; that Cooper continued to reside on the property in Dayton, treating it as his own, after the death of Ludlow; that some intercourse occurred between him and the administrators of Ludlow, toward the settlement of his accounts with the estate of Ludlow; and Lane, C. J., who delivered the opinion of the court, says: "I can not resist the conviction that Cooper and the administrators settled this, with other claims, and that the latter relinquished, as far as they were able, the interest of the estate of Ludlow in this land."

Without, however, reciting the facts found by the court, or the evidence upon which the court based their opinion (a full report of which is found in 13 Ohio, 552), we think the court was fully justified in finding the existence of a state of facts which authorized and required the dismissal of the bill.

The written contract between Ludlow and Cooper shows very clearly what the parties intended. They intended to be equal partners in the property. "They were to be equal in all payments toward the purchase money, as also in the profits or proceeds of

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the sale of said lands, or any part thereof." They were to pay equally, and share alike in the profits of the sales of the lands, or any part of them; and if no *profits*, then they were to be equal in the proceeds of the sales.

It was from the amount of money *received from the sales* of the land that they were to ascertain how much each was to receive. 7] *The parties to the contract contemplated a partnership, in the purchase and *sale* of real estate; and from the location of Ludlow in Cincinnati, and Cooper in Dayton, the place at which the town-lots and lands were situated, it is, to say the least, not improbable that the parties understood that the patents were to issue in the name of Cooper. The whole transaction would suggest that as the proper course to be pursued.

If we are right in our construction of this written instrument, it becomes very material to ascertain whether the property thus purchased is to be, in equity, considered real or personal property; and this question is one not to be answered without difficulty, for it can not be said that the decisions on this question have been entirely uniform.

Story on Partnership, section 93, says: "Indeed, so far as the partners and their creditors are concerned, real estate belonging to the partnership is, in equity, treated as mere personalty, and governed by the general doctrine of the latter; and so it will be deemed in equity to all other intents and purposes, if the partners themselves have, by their agreement or otherwise, properly impressed upon it the character of personalty. But a question has been made whether, in the absence of any agreement or other act affecting its general character, real estate held as part of the partnership funds ought to descend to the heir, or belong to the executor or administrator upon the death of the partner." And he proceeds to say that there is a diversity of judicial opinion as well as judicial decision upon that point, and that the doctrine, under these circumstances, must be open to many distressing doubts.

Kent, who seems to have examined the authorities on this point with care, says: "If partnership capital be invested in land for the benefit of the company, thought it may be a joint tenancy at law, yet equity will hold it to be a tenancy in common, and as forming a part of the partnership fund; and the better opinion would seem 8] to be, that equity will consider the person in whom *the legal

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title is vested as trustee for the whole concern, and the property will be entitled to be distributed as *personal estate*."

In the case of *Pierce v. Trigg*, 10 Leigh, 406, Judge Tucker says: "It has been a vexed question in England, whether the interest of the deceased partner in the real estate, and the proceeds of the sale of that interest, belong to the personal representative or to the heir. The better opinion gives the fund to the former, since, upon familiar principles, as the land was purchased with the personalty and was brought into the firm as stock, it ought, as between the executor and the heir, to replace the fund withdrawn from the personal estate. By placing it as stock in the partnership fund, the deceased evinced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can claim it only as stock, and as stock in trade it is, *ex vi termini*, personal."

The point has arisen several times in our own court, either directly or incidentally. *Green v. Green*, 1 Ohio, 135; *Green v. Graham*, 5 Ohio, 160. In this latter case, the court seems to consider that where land was bought with partnership funds, the partners took as tenants in common; and if one partner died, his share would *descend to his heirs*.

The cases are numerous in which it has been held that real estate purchased with partnership funds and used as partnership property, descends to the heir, subject to the partnership debts.

Indeed, in all cases cited, the property was so purchased, and was either incident to or necessary in carrying on the partnership concern; and there was no express agreement that the real estate should be considered personal property and be disposed of accordingly.

In the case now under consideration, however, the entries were not made with partnership funds, nor were the lands to be used as a *means* of carrying on any partnership business other than the purchase and sale of real estate. It is very clear that, although the land was not purchased with partnership funds, but **was* to be [9 purchased with the separate funds of Cooper and Ludlow in equal portions, the property was to be considered partnership property, so far as real estate could be so considered and treated; that it was, by the agreement, to be *sold and converted into money*, and each partner to share and share alike in the profits, and, of course, to share in the losses. It is the very case put in Story, above cited, in which he says, in substance, that such real estate will, to all in-

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tents and purposes, be deemed personal property, if the parties themselves have by their agreement impressed upon it the character of personalty.

The language of the agreement in this case is: "The parties are to be equal in all payments toward the purchase money, as also in the profits or proceeds of the sale of said lands, or any part of them." Taking this whole agreement together, there can be but little doubt but that the partners intended that this property should be sold as partnership property, and thereby converted, out and out, into personalty, and that either the surviving partner or the present representatives of the deceased partner could, in a court of equity, have compelled a sale and division of the *profits*. If so, it belonged in equity to the *administrators* of Ludlow, and not his heirs. But, if this should be carrying the principle too far, there is still less doubt that this land must be considered partnership stock or property, so far as to be held liable to the payment of partnership debts as well as the debts which, in settlement of the accounts between the partners, may be found due to either. Whether, therefore, by this particular agreement, the property is to be regarded as personal property passing to the administrator or passing to the heir, subject to the payment of debts and settlement of the partnership accounts, in either case the settlement of that account is a matter between the surviving partner and the administrator of the deceased partner, and the interest, if any, which the heir takes, is subject to that settlement. The settlement of the account is devolved upon the administrator and not the heir. In the case of lands held in 10] *common, at law, the several interests of the owners are definite and ascertained; in the case of partnership property, the several share of each partner is the residue of interest after the debts of the firm are paid, and the claims of the other partner are satisfied; but this doctrine does not apply to partnerships in real estate, where, by the *express* agreement of the parties, the land is to be converted into personalty, and the share which each party is to receive is to be ascertained from the amount of money for which the land shall be sold. And although the legal title may be vested in one or more of the parties, still a court of equity will consider the property to be what the parties themselves agreed it should be, and will enforce that agreement.

And here the question is presented, whether the contract of 1803 was ever rescinded or honestly understood by Cooper to be rescinded.

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Upon this subject one of the counsel for complainants, in his argument, says: "It will not be pretended, I presume, that there is any evidence tending to prove an agreement between the parties to the contract, or their representatives, to rescind it. There is not, surely, any such evidence in the case—nothing that looks like it—at least, nothing beyond the letter of Cooper to Findlay, in 1806, in which he proposes to pay the estate \$2,000, as a consideration, if the estate will agree to rescind the contract. There is not a particle of evidence to prove that this offer was entertained or accepted, and no circumstance exists from which its acceptance may be inferred. No credit is given by Findlay, in his account as administrator, for the \$2,000, or any other sum, as having been received by him from this source, which ought to have been and no doubt would have been given, had any such payment ever been made. The fact that no such entry is found in the account, is pregnant evidence that the proposition was not accepted. Notwithstanding all this, the court, in the reported decision of the original case, assume and find that there must have been an agreement of rescission between Findlay, the administrator, and Cooper. It is almost *too* obvious that this conclusion of the court is unwarranted. It is ever to be regretted, *that in the grave decisions of our courts of final resort, such [11 gross inaccuracy in matters of fact may be traced; and such laxity be found to exist in the application of legal principles as is manifest in reviewing the reported opinion in this case."

The letter of Cooper to Findlay, one of the administrators of the estate of Ludlow, referred to in the argument of counsel, is dated in 1804 or 1806, probably in the latter year, and was brought into this case as evidence by the complainants. On the outside, it is addressed to James Findlay, and at the conclusion of the letter, "the administrators." So much of this letter as relates to this case, is in these words: "I expected when Mr. Ludlow returned, he would have brought the certificates with him, but as he did not, I conclude that you and the rest of the administrators have thought best to relinquish the agreement made by Col. Ludlow and myself, respecting the former certificates and the town of Dayton, which I am perfectly agreed to, or I will give the estate \$2,000 for the certificates, and to relinquish the agreement; but not my claim against the company for the former certificates or their value. I will be down in a few weeks, and arrange my affairs with the estate." The Ludlow whose name is mentioned in this letter, we

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understand not to be the Ludlow who was one of the administrators of the estate. At the date of this letter, a brother of Ludlow deceased, Findlay, and Mrs. Ludlow were the administrators of the estate of Ludlow. The heirs at law were all minors.

If we look at this letter without any preconceived opinions, we can not fail to see that the contract upon which the original bill in this case is predicated had been the subject of conversation between Cooper and Findlay; that the agreement here referred to is the same agreement executed by Ludlow and Cooper; and that some propositions had been made by one to the other as to the terms upon which that agreement might be rescinded or relinquished on the part of the estate of Ludlow. That there were in the hands of [12] the administrators some certificates *which Cooper desired to have; that he expected when young Mr. Ludlow came from Cincinnati, the place where the administrators resided, he would have brought these certificates with him—"Cooper expected he would have brought them;" that these certificates were not brought; and for that very reason Cooper came to the conclusion that the administrators had thought best to relinquish the agreement, respecting the former certificates and the town of Dayton, and to which relinquishment Cooper was perfectly agreed. Or he was willing to pay the estate \$2,000 for the certificates, and to relinquish the agreement, but was not willing to relinquish his claim for former certificates or their value. From this letter, the counsel for complainants claims that Cooper proposed to pay \$2,000 to the estate as a consideration to relinquish this contract, and one reason assigned why the contract could not have been rescinded is, that no credit is given by Findlay for the \$2,000, or any other sum in his account as administrator of the estate of Ludlow as having been received from that source. If the contract was, in fact, rescinded upon the terms proposed by Cooper in his letter to Findlay, no such account ought to have been found; for the very obvious reason that Cooper did not in his letter offer to pay the estate *anything* to rescind or relinquish the contract. If certain certificates which Cooper expected Findlay would send to him had been forwarded, then some arrangement or proposition which had been previously made would have been carried out; but as they were not sent, Cooper came to the conclusion that the administrators had thought it best to relinquish the contract, and with which Cooper was satisfied; or, Cooper proposed to give \$2,000 to the estate for the certifi-

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cates, and to *relinquish* the agreement. It was for the certificates he proposed to give the \$2,000. He expected the certificates, but as they had not come, he was satisfied that the contract should be considered rescinded. We think this letter admits of no other fair reading. What these certificates were, or for what payments in land given, does *not very clearly appear; but we under- [13 stand this letter to say, I will give you \$2,000 for the certificates, or if you keep the certificates, I am satisfied to consider the contract at an end, and do now so consider it.

There is no evidence in the case which satisfies this court, or which ought to have satisfied the Supreme Court making the decree sought to be reversed, that Cooper ever sought to conceal the existence of this contract from the *administrators* or heirs of Ludlow. The contract itself was in the possession of Ludlow; it was, according to the claim of complainants, at a late day, found amongst his papers. Cooper understood that the administrators knew of its existence, when he says to Findlay, "I conclude that you and the *rest* of the administrators have thought best to relinquish the agreement." Cooper, in the very nature of things, must have supposed that they knew of the existence of a contract then, in all probability, in their possession. There is evidence, under Cooper's own signature, that he did not desire that Mr. Dayton, then of New Jersey, should know that Ludlow and Cooper had made the agreement. He says, in his letter to Findlay, dated on the same day on which he writes to Dayton, that "for certain reasons I would thank you not to make known to Mr. Dayton that I have given to Col. Ludlow any writing respecting the town of Dayton." These two letters are both dated February 23, 1804—a short time after the death of Ludlow; but still, if we consider the other evidence in the case tending to prove that Dayton expected at least to be, if he was not in fact, interested in the town of Dayton, there arises a very fair presumption that Cooper and Ludlow were both connected in the scheme of keeping from the knowledge of Dayton the existence of this last written contract: and before the death of Ludlow, it is clear that Cooper had no interest in keeping the fact from Dayton except for the *benefit of Ludlow*; because at that time there was neither motive nor interest in Cooper, on his own account, to do so, if it were true, in fact, that Cooper took one-half of the interest *in the land, [14 and Ludlow the other, upon the principle claimed—that is, that Ludlow really had but one-fourth, and Dayton the other. It would:

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not be easy to see what difference is made to Cooper, whether Ludlow held the half in his own right or in his own and that of Dayton. The probability is, that the suggestion of keeping this written contract from the knowledge of Dayton came originally from Ludlow. He had some interest in doing so; Cooper had not. So far as we can see, Cooper, before the death of Ludlow, had no interest in secreting, on his own account, this contract from Dayton.

But did Cooper *intentionally* conceal, or make use of any means to conceal, the existence of this written contract, from either of the administrators of Ludlow, or from the guardians of the minor children? We have no evidence whatever that he did any such thing, and surely we are not permitted to make any such presumption from the mere fact that he, or he and his partner Ludlow, thought it best not to let Dayton know that a written contract had been made by Cooper and Ludlow.

The court in bank, we think, might fairly infer from the evidence, that Cooper never intended nor attempted to conceal from the administrators or heirs of Ludlow the existence of a written contract, not in the possession of Cooper, but in the possession of Ludlow;—the latter having it at the time of his death—and which must have been known to the administrators, or at least may be fairly presumed to be in their knowledge or possession, more especially so when Cooper, in his letter to Findlay, expressly refers to this *written* agreement.

So, also, that court (notwithstanding the fact that the written agreement was found among the papers of Ludlow, after the decease of Cooper, and not lifted by him) might, with good reason, find that the contract, as between the administrators of Ludlow and Cooper, was rescinded and put an end to, and that Cooper so considered it when he said to the administrators in writing: "I conclude that 15] you and the rest of the administrators have thought *best to relinquish the agreement made by Col. Ludlow and myself respecting the former certificates and the town of Dayton, which I am perfectly agreed to." When we consider that this letter was written in the year 1804 or 1806 (and Burnet, who proves the handwriting of Cooper, says the letter bears date in 1804); that there was plenty of other good land to enter at the same price in Ohio; that these lands had not been paid for to the general government; that Ludlow had paid nothing to Cooper; that the estate of Ludlow was embarrassed for money; that the whole of the lands taken together might

or might not turn out to be a profitable investment; it is not by any means an improbable conclusion, that the administrators of Ludlow would think best to surrender the whole to Cooper and relinquish the contract. That the court in bank might fairly find, that up to this time, Ludlow had paid nothing, we think not an unreasonable conclusion. At any rate, we do not see that we would be justified in saying that the court in bank, from the evidence before that court, erred in any of these findings.

If that court was right in these findings, and if the true construction of the contract between Ludlow and Cooper was that the property was to be considered as between them personally, and the same was to be sold and converted into money, and the proceeds of sales, and not the lands itself, be divided between the parties, it was in equity, to all intents, and purposes, personalty, and passed to the administrators and not the heirs, and the administrators alone had the right to settle with Cooper; and having, according to the finding of the court in bank, made that settlement, the heirs have no right to make any claim on Cooper or his representatives, and the court in bank was right in dismissing the bill.

And if the court in bank had a right to consider the land as partnership property and personalty, it makes no difference whether a settlement of the matter took place or not; for the complainants would have no right, as heirs, and could not have *sustained the original bill, and the administrators would [16 have been barred by lapse of time, from sustaining any action.

And, although I am well satisfied, as at present advised, that such is the law of this case, and that in this country it ought to be so held, especially where the certificates of purchase and partial payment, issued by general government, for land, were considered and transferred as personal property, passing by assignment from hand to hand, and the patents issued to and in the name of the assignees; yet, inasmuch as the court in bank did not put the case on that ground, nor was the point distinctly made by counsel, either on the hearing of the original bill or bill of review, we would not feel at liberty to place the case upon that ground alone, without notifying counsel that they might have an opportunity of being heard upon the question.

In the case in 3 Howard, 411, referred to in the argument of one of the counsel for the heirs of Ludlow, the question whether

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such property was personal or real, was made and argued in favor of the proposition that it was personal, by two of the counsel now on opposite sides, but in that case on the same side of the case. This is still an additional reason why we should not put this case upon the ground that the interest of the parties in this land was, by the agreement, converted out and out into personal property, without first notifying the counsel that argument would be heard on this point.

It is, however, a very clear proposition, that this property, even if the patents had been issued to Ludlow and Cooper in their lifetime, would in equity be considered personal, so far as the partnership debts, due either to strangers or one of the partners, were concerned; and that if it descended to the heirs, it would pass subject to these debts, and that the settlement of the accounts between the partners, would be between the survivor and the administrator of the deceased partner, and not the heir. It is also law in Ohio, that where the contract for a conveyance is executory, and the 17] legal title to the property has not passed, *the administrator of the deceased party possesses the power to compromise and rescind the contract, where it may be reasonably considered for the interest of the estate to make such compromise; and a court of equity will uphold such settlement against the claim of the heir at law. *Vide Howard v. Babcock*, 7 Ohio, 72.

Although the article of agreement contains words of a present grant, yet, in order to construe the instrument, we must look at the situation of the property as well as other parts of the agreement. The title was in the general government, and no patent could issue until full payment was made; if such payment was not made, all claim to the title would be forfeited. Ludlow agreed to pay one-half of the purchase money not yet paid, as well as half of what had already been advanced by Cooper. If Ludlow and Cooper were still living, and the whole of the money had been paid by Cooper, and a patent issued in his name, could Ludlow file a bill in equity and compel Cooper to convey the undivided half to him, without averring either payment or readiness to pay on his part? Would a court of equity so construe the contract, as to require Cooper to take the title from the United States to himself and Ludlow, whether Ludlow had ever paid one cent toward purchasing the property or not? Can it be that the covenants on the part of Ludlow and Cooper are wholly independent; that Cooper must take

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the title out in the name of Ludlow, or if taken in the name of Cooper, that he must convey to Ludlow, and look to his covenant alone to compel Ludlow to make payment? We think that such is not the true construction of the agreement. In contracts for the conveyance of real estate, the language must be very clear indeed, if a court will compel a specific performance and conveyance of the land, without either a performance, or an offer to perform, the covenants on the other side. Courts incline to construe, wherever it can be done, such covenants to be at least mutual, and to be performed at the same time. It is indeed argued with much force, that, in this case, *Cooper had the *inchoate legal title*, and by this [18 contract he made Ludlow a joint owner of that title—not an agreement to convey, but an actual conveyance. This may possibly be so; but still the title itself being inchoate in Cooper, his right to the patent depended on his payment of the purchase money to the United States: and such payment was a condition precedent to his right to the legal title, or indeed to any title at all. Ludlow, by his contract with Cooper, was placed in no better situation than Cooper himself; and if ever he acquired the legal title, it would be upon the same terms upon which Cooper acquired title, namely, by payment of his proportion of the purchase money. We think that, as between Cooper and Ludlow, on the one part, and the United States on the other, the contract was executory, and depended entirely for its completion on payment being made to the general government; that, as between Cooper and Ludlow, Ludlow was in no better situation than Cooper, and that his right to the legal title to the land depended on the performance of the contract on his part, viz., the payment of half the first installment, and half of each of the other three as they fell due, to the general government; that the contract was executory, so far as vesting title in Ludlow was concerned, and that he substantially stood, in relation to Cooper, in the same situation that he would have stood, if the legal title at the time of the contract had been vested in Cooper, and Cooper had agreed to convey to Ludlow the undivided half of this land, upon making the payments mentioned in the contract.

If we are right in this construction of the contract, and if the administrators of Ludlow and Cooper did in fact agree to rescind the contract and retain the certificates; and if, in making this rescission, the administrators acted in good faith, and had reasonable grounds for supposing it was best for the estate of Ludlow to do so,

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then, according to the decision in *Howard v. Babcock*, 7 Ohio, 72, a court of equity will not interfere to set aside such contract; 19] nor will it in any manner aid the heirs in enforcing *a specific performance and compelling a conveyance of the land, no matter how valuable this land, after a lapse of thirty years, may have become. Dayton in 1803, was not the Dayton of 1836; and no man could with any degree of certainty foresee what Dayton would be in twenty, thirty, or forty years after the contract was made.

The administrators of Ludlow, in 1804 or 1806, may well have supposed it would be better for the estate of Ludlow to hold on to the land to which he had title, rather than to sell it for the purpose of acquiring title to other lands. There is no pretense that, in 1804, or even in 1806, Cooper had sold for cash enough of the land to pay out the balance; and it was impossible to say at that time that Congress would extend the time of payment until 1813, even by paying interest on the back installments, as the law afterward required. We can not say at this period what at that time ought to have been considered best for the interest of the estate of Ludlow. We do not know whether it might not, at that time, have been necessary to sell, for the payment of these installments, land of much more value than then land about Dayton was considered to be.

That the administrators of Ludlow (or at least Findlay) had conversed about settling this affair, we have no doubt; and that he *supposed he had power* to do so, we have as little doubt. If he, as well as the other administrators, had not considered the affair settled, in all probability we should have heard more about the matter before the death of Findlay.

Upon the whole, therefore, we think that Findlay at least (if not the other administrators) as well as Cooper, considered the whole affair settled and ended, with which Cooper was well satisfied; and that the administrators did not sell to him the certificates for the \$2,000, but retained them; and that nothing more was considered necessary to be done by the parties. Cooper was to pay for and keep the land.

Acting upon the supposition that the affair was settled, Cooper acquired the legal title, paid taxes, sold lots, made donations, and 20] *in various ways spent his time and money to build up the town of Dayton. He kept no account, so far as we know, and for

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the very reason that he considered the land his own. We see no evidence of any attempt on the part of Cooper to act unfairly with either the administrators or heirs of Ludlow, or to conceal the contract from either the administrators or heirs of Ludlow. The purchase turned out to be a profitable one; but, according to the finding of the Supreme Court in bank, Ludlow had paid no money, in fact, until the time of the rescission of the contract by Cooper and the administrators of Ludlow.

Upon the whole, we can not say that the court in bank erred in its finding of the facts, upon which the bill ought to have been dismissed.

As to the newly discovered evidence, it would scarcely be contended that it ought or could have any bearing on the case, even if competent evidence, if the court had found that the administrators and Ludlow had settled the matter, and surrendered the right of the estate to any interest in the contract.

Upon the whole, therefore, a majority of the court is of opinion:

1. That the newly discovered evidence, even if competent, could not and ought not to change the decree.
2. That the court in bank was justified by the evidence before that court, in finding the fact, that the administrators of Ludlow and Cooper, so far as they could do so, rescinded the contract.
3. That, at the time of the rescission, the administrators might with good reason have considered the settlement to be for the benefit of the estate and heirs.
4. That under such circumstances, after a great lapse of time, a court of equity ought not to interfere in aid of the heir at law, especially if there was neither fraud nor unfairness on the part of Cooper. That there is no evidence of any design on the part of Cooper to conceal the existence of this contract from either the heirs or administrators of Cooper.

BARTLEY, J., dissented.
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21] *WATERMAN PALMER v. RICHARD H. DODGE.

S. & P., partners in trade, during the continuance of the partnership, became indebted to a third person for money borrowed, for which a promissory note was given in the name of the firm. After the dissolution of the partnership, and at the maturity of the note, S., in the name of the firm, executed a new note to the creditor, payable at a future day, with D. as surety, and which D. was ultimately compelled to pay. *Held*—

1. That the dissolution of the partnership worked an absolute revocation of all implied authority in either of the partners to bind the other to new engagements, contracts, or promises, made to or with persons having notice of the dissolution, although springing out of, or founded upon, the indebtedness of the firm.
2. That no such power could be inferred, from an authority given by one partner to the other, to settle, liquidate, and close up the affairs of the partnership.
3. That such liquidating partner had no power to extend the time for payment of the obligations of the firm, to increase their amount, or to obligate the firm to persons to whom it was not bound at the dissolution; and, therefore, that P. was not bound by the note given by S. after the dissolution, nor obligated to indemnify D. against the consequences of becoming security upon it.

ERROR to the district court for Washington county.

The action in the original cause was one of assumption.

The bill of exceptions shows the following facts: In the year 1836, the (then) defendant, Palmer, and one Elijah Short entered into partnership in the business of buying and selling merchandise and produce at Lowell, Washington county, Ohio, and the business was managed exclusively by Short, Palmer being a resident of the State of Pennsylvania. The firm continued to do business, a part of the time under the name of E. Short & Co., and the other part under the name of E. Short, until the month of June, 1841, when, by mutual consent, it was dissolved, and the following notice published in the Marietta Intelligencer, to wit:

22]

*“NOTICE.

“The copartnership heretofore existing between the undersigned, under the firm of E. Short & Co., and E. Short, at Lowell, Washington county, Ohio, is this day dissolved by mutual consent.

“The remaining unsettled business of the firm will be adjusted

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by E. Short, who is hereby authorized to close all business transactions of the late firm.

"LOWELL, June 28, 1841.

"E. SHORT,
W. PALMER."

Dodge, who instituted this suit in the court below, was a subscriber to this newspaper.

At the time of the dissolution, one Sally Dana held the promissory note of the firm of E. Short & Co., for a sum of money lent by her to the firm, which fell due some months afterward. On the day when the note came to maturity—viz., April 15, 1842—Short, in the name of the late firm of E. Short & Co., with the said R. H. Dodge as surety, executed a new note to Mrs. Dana for principal and ten per cent. interest, due at twelve months. The agent of Mrs. Dana, who attended to the taking of this note for her, knew that the firm was dissolved. At the maturity of this last note, it was again renewed for a year, at the same rate of interest, by Short, in the name of the late firm of E. Short & Co., and with Dodge as security. In April, A. D. 1846, Short died, leaving the last-mentioned note due and unpaid; and the same, with legal interest, was paid off by Dodge in the following month of June. He then brought this action of assumpsit against Palmer, the surviving partner, to recover from him the amount thus paid to Mrs. Dana.

On these facts the counsel for Palmer requested the court to charge the jury that E. Short, after the dissolution, had no authority to give said note to a person having knowledge of the dissolution, so as to bind the late firm of E. Short & Co.; and that said Dodge, having gone security on the note given after the dissolution, and with notice of it, had no right to recover from Palmer the money paid by him in discharge of the note.

The court refused to give these instructions, but charged the jury, that Short, after the dissolution, could not give a note [23 in the name of the firm so as to bind his copartner thereby; but if Short, in the performance of his agency in settling up the business of the firm, thought it necessary for the interests of the firm to renew the note, and in good faith obtained Dodge as security for that purpose, he (Dodge) might recover from Palmer the amount originally loaned to the firm, with six per cent. interest thereon.

The jury having found a verdict, and judgment being given thereon for plaintiff, this writ is sued out to reverse that judgment.

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S. F. Vinton, for plaintiff in error, made the following points in argument:

I. After dissolution, a partner of the firm can not make a note (be the consideration what it may), which shall bind the other members, without express authority from them so to do.

II. Whether the proposition just stated be sound or not, the advertisement in question gave to Short no authority to execute a note for or in the name of the firm.

Considering these propositions together, he cited:

2 Bell's Com. 643, 644; Collyer on Part., sec. 541; 3 Kent (5 ed.), 63; Story's Part., sec. 322; Abel v. Sutton, 3 Esp. 110; Pindar v. Wilkes, 1 Marsh. 248; S. C., 5 Taunt. 612; Kilgour v. Finlyson, 1 H. Black. 155; Hackley v. Patrick and Hastie, 3 Johns. 536; Martin v. Walton & Co., 1 McCord, 16; Sanford v. Nickles, 4 Johns. 227; National Bank v. Norton and others, 1 Hill, 572; Parker v. McComber, 18 Pick. 509; Perrin v. Keene, 19 Maine, 357; Story on Part., sec. 328; Bell v. Morrison, 1 Pet. 370; White v. Union Ins. Co., 1 Nott & McCord, 561; Bowman v. Blodgett, 2 Met. 308; Tom v. Goodrich, 2 Johns. 213; Arnold v. Camp, 12 Ib. 409; Waugh v. Caniger, 1 Yerger, 31; Evans v. Drummond, 4 Esp. 93; Ostrand v. Jacob, 9 Met. 454; Springer v. Shirley, 11 Maine, 204; Thompson v. Percival, 5 Barn. & Adol. 925; Collyer on Part., sec. 561.

24] *He also cited *Darling v. Marsh*, 22 Maine, 184; spcs. 546, 540, 199, 121, 118, of Collyer on Part.

He stated the following conclusions:

1. That Short had no authority to sign the name of the firm to the note in question.

2. That the note did not bind either the firm or Palmer, but, as against both, was void.

3. That the acceptance by Mrs. Dana of the new note, after dissolution, was a discharge of the old debt.

4. That there was no privity between Dodge and the firm, or between Dodge and Palmer.

5. That the note in question was the individual note of Short and Dodge.

6. That as between themselves they sustained the relation of principal and surety.

7. That Dodge must look to the estate of Short (his principal) for indemnity, and can not look elsewhere.

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8. That the payment of the note to Mrs. Dana did not inure to the benefit of the firm, the firm having been previously discharged from her claim.

9. Consequently, no assumpsit for money had and received to the use of the firm can be implied against the firm or against Palmer, in favor of Dodge.

Arius Nye and William S. Nye, on the same side:

The rule that, after a dissolution, none of the partners can create any new contracts or obligations, binding upon the firm, is well settled. Story on Part. 458, 459; Gow on Part., ch. 5, sec. 2; 1 Collyer, ch. 2, sec. 3; 3 Kent, 63; 1 McMullan, 209; 1 App. 355; *Whitehead v. Bank of Pittsburg*, 2 Watts & Serg. 172; *Martin v. Kirk*, 2 Humph. 529; *Brewster v. Hardman*, Dudley, 138.

Goddard, Whittlesey & Towne, for defendant in error:

I. It does not appear from the bill of exceptions that Dodge had notice of the dissolution. Whether he had or not, was a question of fact for the jury. The jury found a verdict for Dodge.

*The bill of exceptions does not show whether Dodge was [25 a customer of the firm, or a stranger to it. No inference can be drawn favorable to the plaintiff in error from this omission, and we must assume that he was a customer and was entitled to actual notice of the dissolution. The plaintiff in error attempts to prove this. He gave in evidence the newspaper in which the notice of dissolution appeared, and proved that Dodge was a subscriber to it. Competent evidence, undoubtedly, but not sufficient; and so the jury found. The sufficiency of a newspaper notice may be questioned, "unless it is shown that the party entitled to notice *was in the habit of reading the paper.*" 3 Kent's Com., 7 ed. 79.

"The doctrine seems to be that merely taking a newspaper in which a notice is contained, is not sufficient to charge a party, for it is not to be intended that he reads the contents of all the notices in the newspapers which he may chance to take." *Ib.* 80, note, citing several American cases.

The above passage from Chancellor Kent is cited with approbation in Mr. Perkins' very valuable edition of Collyer on Partnership, ed. 1853, sec. 533, note 2.

II. If a partnership should expire the day before a note fell due, and one partner, in good faith, should borrow money to take it up,

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the other partner would be liable. The common doctrine of subrogation would put him in the place of the creditor, with a demand against both partners.

III. The following cases from Pennsylvania fully establish this position :

There can be no difference between a person lending money to take up a note, and one becoming security upon a new note.

To say that there is no privity between the security and the retired partner, is simply begging the question. During the continuance of the partnership, the authority of one partner to borrow money for the legitimate use of the firm, is undoubted. There is no actual privity between the lender and the other partner whom 26] he never saw. *Davis v. Desauque, 5 Wharton, 531 ; Houser v. Irvine, 3 Watts & Serg. 347 ; Brown v. Clark (approving these cases), 14 Penn. St. (2 Harris), 475.

RANNEY, J. Short and Palmer were partners in business, from 1836, to June 28, 1841. During the existence of the partnership, the firm borrowed money of one Sally Dana, for which a promissory note was given, and several times renewed, and which remained unpaid, at the time the partnership was dissolved. After the dissolution, and on April 15, 1842, Short, in the name of E. Short & Co., with the defendant in error as surety, executed a new note to Mrs. Dana, for the principal and interest then due, payable in one year. It was proved that the agent of Mrs. Dana who took this note, knew the partnership was dissolved ; and it was further shown that Dodge took the newspaper in which the notice of dissolution was published. This note was once renewed by the same parties, and subsequently, and after the death of Short, was paid off by the surety, Dodge, who brought this action to recover the amount of Palmer, as so much money paid for the use of the firm.

On these facts the counsel for Palmer requested the court to charge the jury, that E. Short, after the dissolution, had no authority to give said notes to a person having knowledge of the dissolution, so as to bind the late firm of E. Short & Co. ; and the said Dodge, having gone security on the note given after the dissolution, and with notice of it, had no right to recover from Palmer the money paid by him in discharge of the note.

The court refused to give these instructions, but charged the jury that Short, after the dissolution, could not give a note in the name

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of the firm so as to bind his copartner thereby; but if Short, in the performance of his agency in settling up the business of the firm, thought it necessary for the interests of the firm to renew the note, and in good faith obtained Dodge as security for that purpose, he (Dodge) might recover from Palmer *the amount originally [27 loaned to the firm, with six per cent. interest thereon.

As no claim is made that Palmer came under any direct engagements to Dodge, or that he ever authorized Short to execute this particular note, or afterward recognized or ratified his act, it is evident the case must depend upon the authority retained by Short, as a member of the dissolved partnership, or upon that specially derived from the agreement of dissolution. We have carefully considered the case in both these aspects, and can see no sufficient reason why the instruction asked for should have been refused. Indeed, it seems quite impossible to justify the refusal, or support the charge as given, consistently with well-established and salutary principles, applicable to the law of partnerships.

During the continuance of the partnership, each member has the undoubted right to bind his associates to the performance of every contract he may make in the name of the firm, within the limits allowed by the articles of association; and they are equally bound to third persons, having no notice of any special limitation of his power, upon all contracts within the scope and objects of the partnership, although he may have overstepped such limitations. In such cases, the contracting partner acts for himself, and as the authorized agent of his copartners. His authority, it is true, need not necessarily arise from the express terms of the partnership agreement, but the law implies it from the community of interest and joint object for which the association is formed; and, as it is ordinarily necessary to the attainment of its ends, reasonably infers the power of each to act for all, as within the understanding and contemplation of the parties. They are supposed to have reposed this confidence in each other, and however much it may be abused, in behalf of innocent third persons, the conclusive answer is, that the loss must fall upon those who have given the ability to do the wrong.

This capacity continues as long as the joint operations of the *firm endure, and contracts are necessary to accomplish its pur- [28 poses. For the protection of third persons, it may continue longer. As the period of its dissolution, by the agreement of the parties, may only be known to themselves, the law exacts, not only that

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they should hold themselves out no longer as operating jointly, but that they use reasonable diligence to advise others of the termination of their previous connection. As to those who have previously dealt with the firm, the notice must be actual; as to others, public notice in some newspaper circulating in the neighborhood is sufficient, if even that is required.

In such cases, the other partners are charged for their negligence in omitting to perform a duty which the law requires at their hands, intended to protect third persons against the unauthorized acts of their associates. But where no question of notice intervenes, the dissolution works an absolute and unqualified revocation of all power and authority in either of the partners to bind the others to any new engagement, contract, or promise. In the language of Judge Story (Story on Part., sec. 322): "None of the partners can create any new contracts or obligations binding upon the partnership; none of them can buy or sell, or pledge goods on account thereof; none of them can indorse or transfer the partnership securities to third persons, or in any other way make their acts the acts of the partnership. In short, none of them can do any act, or make any disposition of the partnership property or funds, in any manner inconsistent with the primary duty, now incumbent on all of them, *of winding up the whole concerns of the partnership.*"

As the dissolution finds the engagements of the company, they must remain until liquidated and paid, unless all the partners consent to come under new engagements or otherwise change their character. But while the law thus effectually revokes the implied authority of each partner to incur new obligations for his fellows, it leaves upon each of them the duty, and continues to each the right, 29] of doing whatever is necessary to collect the *debts due to the partnership, and to adjust, settle, and pay its debts. "For (as stated by the same author) *all these acts*, if done *bona fide*, are for the advancement and consummation of the great objects and duties of the partners upon the dissolution, *to wind up the whole partnership concern* and divide the surplus, if any, among them, after all debts and charges are extinguished."

This right of each of the partners to participate in the settlement of its concerns, can not be interfered with by his copartners, without subjecting them to the controlling power of a court of equity; but it may, of course, be voluntarily relinquished by him-

self, or he may, if he sees fit, invest them with more extended authority than the law will imply in their behalf.

Appended to the notice of dissolution signed by the partners, and published in this case, is this clause: "The remaining unsettled business of the firm will be adjusted by E. Short, who is hereby authorized to close all business transactions of the late firm." This notice is good evidence of the agreement of the parties, and conclusive in favor of third persons who have dealt with Short, relying upon it. But no one could or had a right to understand it as authorizing Short to do more than to adjust and settle the unfinished business, and close up the transactions of the firm. This power he had without the agreement; it added nothing to the authority which the law gave, and took nothing from it. Without the agreement, Palmer would have had equal authority, and the utmost effect that can be given to the stipulation, would be to consider it as a surrender of the right by him, and as having invested Short alone with the power before possessed by both.

There is not a word in it to indicate an intention to confer upon him the authority to create new obligations. He is, therefore, remitted to his power as a partner, and considered in that light, it is very clear, he possessed no such authority. The elementary books and adjudged cases speak an almost uniform language upon the subject.

*In Bell's Commentaries (2 vol. 644), it is said: "After [30] dissolution, no valid draft, acceptance, or indorsation can be made by the firm; and it is no authority to do so, if any one partner is, in the notice, empowered to receive and pay the debts of the company. The indorsation, draft, or acceptance *must be done by all the partners*, or by one *specially empowered* so to act for them." And he confines the power to "*acts of administration* which are necessary for winding up the concern."

Collyer on Partnership, in section 541, says: "Where a *bona fide* dissolution has taken place, the retiring partners are not to be bound by instruments negotiated in the name of the original firm after such dissolution, *even though they are negotiated by a partner authorized to settle the partnership concerns.*" To the same effect, see 3 Kent's Com. (5 ed.) 63; Story on Part., sec. 322.

In England, Abel v. Sutton, 3 Esp. 110, is the leading case, and has been uniformly followed ever since.

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In that case, a promissory note due to the firm at the time of dissolution, was afterward indorsed in the name of the firm by a partner *who had authority to settle and liquidate the partnership effects*, of which notice had been given in the Gazette; suit was brought by the indorsee to charge all the members of the firm as indorsers of the note.

For the plaintiff, it was insisted :

1. That if the note existed before the dissolution, a partner *having authority to settle and liquidate the partnership accounts*, had a right to put the partnership name upon it, and that a *bona fide* holder might resort to all the partners.

2. That if the indorsing partner raised money by sale of the note, and applied it in payment of the partnership debts, it was money had and received to the use of the partners, and all would be liable.

Lord Kenyon most emphatically denied both of these propositions, and held that a recovery could not be had on the indorsee-
31] ment, *or on the money counts, against any but the indorsing partner. He says: "To contend that this liability to be bound by the acts of his partner, extends to time subsequent to the dissolution, is, in my mind, a most monstrous proposition. A man, in that case, can never know when he is to be at peace, and retired from all concerns of the partnership."

In that country, from that day to this, there has been a constant and most decided leaning against giving effect to new contracts, notes, or other instruments made by a partner for the firm after dissolution, as will be seen by the cases of *Pindar v. Wilkes*, 1 Marshall, 248; same case, 5 Taunt. 612; *Kilgour v. Finlyson*, 1 H. Black. 155.

One of the earliest American cases is that of *Hackley v. Patrick and Hastie*, 3 Johns. 536. Patrick and Hastie were partners in trade; they dissolved their partnership, and made publication of their dissolution. The advertisement requested all persons having any unsettled business with the firm, to call on Hastie for adjustment of the same.

Two years afterward, the plaintiffs exhibited an account against the firm, on which Hastie indorsed for the firm an acknowledgment that it was due. Suit was brought on this account against Patrick and Hastie, and the question was, whether the acknowledgment was sufficient to charge the defendant, Patrick? The court said :

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"It was a clear case, that Hastie could no more bind his copartner by this acknowledgment, than he could do it by giving a promissory note in the name of the firm."

Martin v. Walton & Co., 1 McCord, 16, is another American case of early date. In that case, the firm of Walton & Co. had been dissolved, and notice given by advertisement that Walton, one of the partners, was authorized to settle the concerns of the partnership. At the time of the dissolution of the firm, it was indebted, by note, to the plaintiff. After the dissolution, the note then in question was given by Walton, in the name of the firm, as a *renewal note*, and the question was, whether this note was *binding on the [32 other partners. The court said: "There is no doubt, that if the note was given after the dissolution of the partnership, and the plaintiff had notice of it, the firm are not bound. An *authority* to one of a copartnership to *settle the affairs*, receive and pay the debts, does not warrant him to draw a bill or give a promissory note in the partnership name."

In *Sanford v. Nickles*, 4 Johns. 227, the disability of a partner after dissolution to indorse bills given before the dissolution, *even if he had authority to settle the partnership affairs*, is held to be settled law.

This question again came up at a much later period, and was elaborately considered by the Supreme Court of New York, in the case of the *National Bank v. Norton* and others, 1 Hill, 572.

That was an action of assumpsit against the defendants, as makers and indorsers of a promissory note. The note was dated in January, 1840, and purported to have been indorsed by Seaman and Norton as first indorsers, and by Henry J. Seaman as second indorser. Seaman & Norton was the name of a former firm, composed of Henry J. Seaman and the defendant, Norton. Both indorsements were in the handwriting of Seaman. The firm was dissolved in 1837, and notice of the dissolution was then published. The advertisement was in these words, viz:

"The copartnership heretofore existing between the subscribers, under the firm of Seaman & Norton, is this day dissolved by mutual consent. *The business of the firm will be settled by Henry J. Seaman, who is duly authorized to sign the name of the firm for that purpose.*"

A short time prior to the dissolution, the National Bank had discounted for the firm of Seaman & Norton, a note drawn by the

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same makers with the one then in question, and indorsed by the firm. That note was held by the bank when the dissolution took place. It had been renewed from time to time by the same parties, 33] and the note then in question was given, by way of *renewal, for the balance then remaining due on the loan. The question was, whether the partner, Norton, was liable?

The court, in the first place, lay down and enforce the doctrine as settled law, that one partner, after dissolution, can not bind the others even by the renewal of a partnership note. They then proceed to say: "The note in question, a renewal note, which had been running in bank before the dissolution, was renewed by Seaman, one of the partners, afterward. It was, of course, *void in respect to Norton, his copartner*, unless a power of renewal *was expressly delegated* at the time of the dissolution. The plaintiffs claim that such power was delegated, and base themselves on the clause in the advertisement of dissolution, declaring that the business of the firm was to be settled with Seaman, who was authorized to sign the name of the firm for that purpose. This was no more than a power to *liquidate* partnership demands, and *sanction the liquidation by the firm name*. It gave no more power to renew the old note, than to give one payable in chattels."

The court review and comment upon the above-mentioned cases of *Abel v. Sutton*, 3 Esp. 110; *Martin v. Walton*, 1 McCord, 16; and *Hackley v. Patrick & Hastie*, 3 Johns. 536—all three of which, they say, were in point. In respect to them they use this language:

"These were all cases of express authority to settle after dissolution; yet the first holds, that the power did *not extend* to indorsing a partnership note *even in liquidation of a partnership debt*. In the second, it was denied to be a power of *renewal*; and in the third, a power of *adjustment* was denied to operate as an authority *to sign an account stated*. In the case at bar, an express power to use the name is given; but it is confined to the purposes of adjustment (settlement). The words did not work an extension of power in any respect beyond the form of doing the business."

The same question came before the Supreme Court of Massachusetts 34] in the case of *Parker v. McComber*, 18 Pick. 509. There a firm, consisting of three partners, was dissolved; two of them were authorized to collect the debts and settle the business of the partnership. They indorsed a note due to the firm at the

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time it was dissolved. The question was, whether the other partner was liable as indorser of the note.

For the plaintiff, it was insisted that the authority given to the two other partners raised the inference, that it was intended to give them power to negotiate the note then in question. The court said in reply: "We can not perceive the correctness of this inference. Were it sound, each partner must be presumed to know of all the negotiable bills and drafts due to the firm and unindorsed at the time of the dissolution. He must be presumed to have intended to give authority to negotiate them in the name of the firm. But if this were so, the general rule of law would be, that an authority to settle the business would be of course an authority to indorse negotiable securities; *but the general rule is clearly the other way.*"

This question arose also in the State of Maine in the case of *Perrin v. Keene*, 19 Maine, 357. There one Weston, a partner having authority *to close up and settle the affairs of a partnership*, settled an outstanding account and gave three notes of the firm for the debt, which was divided into installments. Keene, who was a member of the dissolved firm, resisted payment. The court said: "Weston had no right to *sign the notes* in suit *in the name of the firm*, unless he derived it from the authority given to him to settle and adjust the copartnership business. This does not give him any power to make new contracts, or to create new liabilities binding on the firm. No such power can be derived from the agreement that Weston should *settle and close up* the business of the firm. The notes, then, were made and delivered *without authority*, and are *not valid against the firm.*"

And the same doctrine is most explicitly declared in *Darling v. Marsh*, 22 Maine, 184.

*And finally, the Supreme Court of the United States, in *Bell v. Morrison*, 1 Pet. 351, after a very elaborate examination of the subject, thus announce the result: "The light in which we are disposed to consider this question is, that after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration

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which might prove beneficial to them. Unless adopted by them, they are not bound by it."

Further illustrations of the doctrine may be found in *Mitchell v. Ostram*, 2 Hill, 520; *Root v. Wellford*, 4 Munf. 215; *Fisher v. Tucker*, 1 McCord's Ch. 172; *Neal v. Hassen*, 3 McCord, 278; *Foulz v. Paine*, 2 Dessaus. 40; *Marvin v. Kirk*, 2 Humph. 529.

In opposition to this prevailing current of authority, we are referred to three cases decided by the Supreme Court of Pennsylvania: *Davis v. Desauque*, 5 Wharton, 531; *Houser v. Irvine*, 3 Watts & Serg. 347; and *Brown v. Clark*, 14 Penn. St. 475. In the first of these cases, it seems to have been held, that a partner authorized to close up the affairs of a dissolved partnership, might renew a note drawn by the firm, or even borrow money on the credit of the firm to pay its debts; which, if but *bona fide*, and faithfully applied, would create a valid claim against the other members of the firm, although the creditor had knowledge of the dissolution. It may well be doubted whether the court intended, in the two latter cases, to press the doctrine so far, or to approve of all that is said in that case. Ch. J. Gibson, in *Houser v. Irvine*, seems to consider what he calls the ruling principle of that case to have been an affirmation of the authority of the partner to renew the evidences of the firm's indebtedness; and he admits that, "by the dissolution of the partnership, the power which each had to bind the other is at 36] *an end, except . . . to finish what remains to be done in order to close its concerns." Even to this extent it would find little or no support in judicial opinion out of that state, although it might not be deemed a very wide departure from principle when the obligations of the firm were not materially changed.

The case called for an application of the doctrine which allows the acts and acknowledgments of one of the partners, after the dissolution, to take a contract of the firm out of the operation of the statute of limitations. This doctrine, originating, as Judge Story says, in an unreasoned decision of Lord Mansfield, in *Whitcomb v. Whiting*, Doug. 652, in which his lordship "dryly and briefly" said: "Payment by one is payment for all, the one acting virtually as the agent for the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due," has been very generally repudiated in this country, and so far as I am advised, uniformly by the courts of this state. But the very ground upon which this con-

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trover has proceeded, affords indubitable evidence of the general acquiescence in the principle which denies the power of one partner to bind the firm to new engagements; those who support the doctrine insisting that the acknowledgment is a mere continuation of the original promise, and those who oppose it, regarding it as a new contract or promise springing out of, and supported by, the original consideration.

We see nothing to relieve this case from the operation of this settled principle. If we admit the power to renew the obligations of the firm without increasing or materially changing its liabilities, or the right of the unpaid creditor of the firm to resort to his original obligation, it does not help the defendant. The note to which he was a party was, in substance and legal effect, widely variant from that for which it was taken. It had different parties, a larger amount upon interest, and a distant day for payment. Short could effect none of these changes for the firm *without a new [37 authority. It was his duty to close up and settle the partnership liabilities, and not to prolong them by new credits; to deal with the existing creditors of the firm, and not to make others; to discharge its existing indebtedness, and not to add to it.

But the creditor of the firm has been fully paid; and how has Dodge become its creditor now? He surely could not make himself such without the assent or request of all its members. He does not claim that Palmer ever personally requested him to assume or pay any of its liabilities; and Short had no power to create the relation of debtor and creditor between him and Palmer. He became the surety upon a note which bound Short alone, at the request of Short, and is therefore the surety of Short, and must look to him alone for indemnity.

He stands in no better condition, certainly, than the plaintiff did in the case of *Bowman v. Blodget*, 2 Met. 308, who, in a suit against both the partners of a dissolved partnership, for a partnership debt, became the bail of one of them, and was obliged to pay the debt, and in which the court held that he could recover no part of the amount from the other partner.

We should find no difficulty in holding that the proof of the dissolution was sufficient to charge Dodge, in the absence of any proof, on his part, to show that he had dealings with the firm before its dissolution. But this question is wholly immaterial, as the court, in effect, took it from the jury, and charged that Dodge would be

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entitled to recover, notwithstanding he had notice, if Short, in good faith, thought it necessary to renew the note, and procured him to become security on it. In this we think they erred; and the judgment, so far as the amount of this note entered into it, must be reversed.

38] *CHARLES TROWBRIDGE v. OLIVER T. HOLCOMB ET AL.

An agreement to pay \$1,500 in wool, at twenty cents per pound, may be discharged by the payment of \$1,500 in money. That sum, and not the market value of 7,500 pounds of wool, is the measure of damages, if the wool be not delivered.

BILL IN CHANCERY to foreclose a mortgage; reserved in Geauga county. The facts sufficiently appear in the opinion of the court.

W. L. Perkins, for complainant, made the following points:

I. The right determination of the suit depends on the construction of the agreement in the mortgage and notes, which, being of the same date and same transaction, altogether constitute the agreement.

When the terms of a contract admit of more senses than one, the court is to construe it "so soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury," *Chitty on Contracts*, 8 ed. 73; 1 *Greenl. Ev.*, sec. 277.

The language used by a party to a contract must be construed as he supposed the other party would understand it (*vide* *Paley's Moral Philosophy*), or as the other party had a right to understand it. *Gunnison v. Bancroft*, 11 *Vermont*, 493.

Taking the notes and mortgage together, the intention of the parties was to buy and sell a farm for wool, and that it should be paid for in 7,500 pounds of wool; and if this suit had been an action at law on the notes, no defense could have been attempted against that view of the subject.

The objection, "that this proceeding being on the mortgage to subject the land, Holcomb being insolvent, and the mortgage specifying an indebtedness of \$1,500, that amount of money and *interest should pay it," can not, with any propriety, be applied to

Holcomb, for he executed the notes, too, and the whole are one contract.

II. It is sufficiently apparent from the mortgage itself, that it was intended that the payment should be in wool.

III. But, if it were otherwise, are not Dutton, Cushman, and Richmond chargeable with notice of the existence and contents of the notes?

What puts a party on inquiry is sufficient notice. A deed which refers to another deed, or "which leads the purchaser to another fact," gives him notice of such other deed or fact. 2 Leading Cases in Equity (pt. 1), 100, 103; *Bolles v. Chauncey*, 8 Conn. 390; *Sigourney v. Munn et al.*, 7 Conn. 324. "A purchaser who has actual notice of one instrument affecting an estate, has constructive notice of all other instruments to which an examination of the first could have led him." 2 L. C. in Equity (pt. 1), 103; *Moore v. Bennett*, 2 Ch. C. 246; *Coppen v. Ferneyhough*, 2 Bro. C. C. 291.

The mortgage is referred to by recital in each of the deeds, to Dutton, Cushman, and Richmond, and the mortgage shows that notes were given for the wool.

One purchased an estate with notice of a post-nuptial settlement, not recited in the deed; the court held he should have gone to the wife's relations, who were parties to the deed, and made inquiry whether it was voluntary, or made in pursuance of an agreement before marriage. 2 Leading Cases in Equity (pt. 1), 104; *Ferrors v. Cherry*, 2 Bridg. Dig. 689; 2 Vern. 384.

Whatever is sufficient to direct attention of the purchaser to prior rights and equities of third persons, and to enable him to ascertain their nature by inquiries, will operate as notice. 2 Leading Cases in Equity, 116, and numerous cases there cited. To the same purpose is *Hurd v. Vattier*, 1 McLean, 118.

Mr. Perkins also cited the following authorities: *Edgar v. Bois*, 1 Serg. & R. 445; *Price v. Introbe*, Harper, 111; **Wilson v. [40 George]*, 10 N. H. 445, *McDonald v. Hodge*, 5 Haywood, 85; *Langtry v. Walker*, 6 Humph. 336; *Hixon v. Hixon*, 9 Humph. 33; *Sedgwick on Dam.* 241; *Henry Petoe's case*, 9 Coke, 77.

IV. The plaintiff is entitled to a decree for the highest price on the quantity of wool in each note, between the time when it was due and the day of decree, with interest from the time of such highest price. *Chipman on Con.* 285; *Clark v. Pinney*, 7 Cow. 212; *West v. Pritchard*, 19 Conn. 217.

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Riddle & Thrasher, for defendants :

I. Richmond can be reached only through the mortgage. He is by it advised that there are notes only, and is permitted to presume that they are in ordinary form; or, at the most, that they conform to the mortgage.

II. But even if Richmond is charged with notice of the terms of the "wool notes," he can not be affected by them. Whatever may be the rights of the plaintiff at law on those notes against the maker, he can enforce none against Richmond. His liability is measured by the mortgage, and that expressly provides, that it shall be void on the payment of the debt, not according to the tenor and effect of the notes, but according to the terms of the mortgage; and when those terms are complied with, the cloud vanishes: and if the plaintiff has not received full redress, he must seek it elsewhere, through other channels.

III. This is a contract for the payment of a debt of \$1,500, in wool, at twenty cents per pound, and not to be treated as a mere contract for the delivery of property. We are not aware that any decision in Ohio has settled the amount recoverable for the non-payment of such a contract, in the property specified. We think, however, that the case of *Newman v. Robert*, 5 Ohio, 349, recognizes the doctrine, that it would be the originally expressed sum in money.

Under this head, counsel cited: *Pothier on Ob.*, No. 497; 41] **Chipman on Con.* 35, 36; *Perry v. Smith*, 22 Vt. 301; *Smith v. Smith*, 2 Johns. 235; *Brooks v. Hubbard*, 3 Conn. 58; *Baker v. Mair*, 12 Mass. 120; 12 Sm. & M. 495.

THURMAN, C. J. March 11, 1847, Oliver T. Holcomb, in consideration of the sale and conveyance by Philander Farr to him, of a farm in Geauga county, made his seven promissory notes, payable in wool to Farr or bearer on July 1st, in the years 1848 to and including 1854, respectively; the first two being for 1,000 pounds each, and the remaining five for 1,100 pounds each. These notes are alike in form, the only difference being in the amounts and times of payment, as above stated. The following is a copy of one of them :

"For value received, I promise to pay Philander Farr or bearer, 1,000 pounds of wool by the 1st day of July, 1849, provided that

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this note and the payments are to be on all the conditions and stipulations in a mortgage given by said Holcomb to said Farr, to secure the payment of this and other wool notes, dated the 11th day of March, 1847; this wool to be delivered at my house.

(Signed,)

"OLIVER T. HOLCOMB.

"CHARDON, *March 11, 1854.*"

At the same time and upon the same consideration, Holcomb reconveyed the farm to Farr by the mortgage deed referred to in the notes, the condition of the mortgage being in these words:

"Whereas, Oliver T. Holcomb is indebted to the said Farr in the sum of \$1,500, to be paid in wool at the times and in the manner following, to wit: 1,000 pounds by the 1st day of July, 1848: 1,000 pounds by the 1st day of July, 1849; and 1,100 pounds payable each year for five years from said 1st day of July, 1849—and said payments are not to draw interest—making in all 7,500 pounds of wool. It is always understood between the parties to this instrument that the said Farr is not to have the right to sue the said Holcomb upon any of the above *payments, or to foreclose [42 this mortgage, provided one-half of each note is paid when due, until the last payment becomes due (should said Holcomb fail to pay the same as they become due). And it is further agreed by the said parties, that if said Holcomb shall not have wool enough to pay the full amount of each payment as they become due, that the said Farr shall receive whatever wool he (said Holcomb) may have to turn out on each payment when it becomes due, at twenty cents per pound, and cancel so much of said indebtedness as said wool will come to at that price. Now, if said Oliver T. Holcomb, his heirs, assigns, etc., shall well and truly pay the aforesaid amount of wool, according to the terms of this instrument, to said Philander Farr, or assigns, then the above deed to be void."

April 6, 1847, Farr sold and assigned the notes and mortgage to one Searls, who, on September 27, 1847, sold and assigned the same to the complainant.

July 1, 1848, the first note fell due and was paid in wool.

July 31, 1848, Holcomb and wife, by quitclaim deed, released all their interest in the farm to Farr.

December 8, 1848, Farr and wife conveyed it to Rodney B. Dutton, subject to the mortgage.

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November 22, 1849, Dutton conveyed it to Levi Cushman, subject to the mortgage.

April 18, 1851, Cushman and wife conveyed all but twenty-five acres to Lansing Richmond.

When the notes payable July 1, 1849, 1850, and 1851, matured, they were respectively presented for payment, and payment in wool demanded, which was refused, and a right asserted to pay in money one-half of each note at the rate of twenty cents for each pound of wool, viz., \$100 on each note. This claim the complainant denied, but he agreed to and did receive the money offered, with the understanding, however, that he should not be thereby prejudiced in his right, if such right he had, to recover the excess which might exist by estimating the wool at the then current market price of wool.

43] *This bill is filed to foreclose the mortgage, the complainant contending that one-half of the matured notes has not been paid, and that consequently he is entitled to foreclose for the full amount of these notes less the sums paid. This position rests upon the assumption, that the debt could be discharged only by the payment of wool, or the current market value of wool. If it could be discharged by the payment of money, at the rate of twenty cents for each pound of wool, then, as one-half of the notes, thus estimated, was duly paid, it is admitted that the bill can not be sustained; the terms of the condition of the mortgage forbidding it.

The notes and mortgage must be construed together. They refer to each other, and are but parts of one contract. This is more plainly the case than is usual in such transactions, since very important provisions contained in the condition of the mortgage are made parts of the notes by their very terms. Thus construed, we are of the opinion that the legal effect of the contract is an undertaking to pay \$1,500 in money, or in wool at twenty cents per pound, to wit, 7,500 pounds, at the option of the payer. Upon no other construction can certain terms of the mortgage-condition be accounted for. Thus it is therein recited that "Holcomb is indebted to the said Farr in the sum of \$1,500 to be paid in wool," etc. Now, if the complainant is right, this recital is worse than useless; it is a falsehood. Upon the complainant's construction, Holcomb did not owe Farr \$1,500, but owed him 7,500 pounds of wool, the non-delivery of which might create a liability for more or less than \$1,500,

according to what might be the market price of wool at the maturity of the notes.

Again, "It is further agreed by the said parties," says the condition, "that if said Holcomb shall not have wool enough to pay the full amount of each payment as they become due, that the said Farr shall receive whatever wool he (said Holcomb) may have to turn out on each payment when it becomes due, *at twenty cents per pound*, and cancel so much of *said indebtedness* *as said wool [44 will come to at *that price*." Why this mention of "twenty cents per pound," this reference to "*said indebtedness*"—to wit, the before-mentioned indebtedness of \$1,500—and these words, "*that price*," if it was not the understanding of the parties that the debt was \$1,500, to be discharged either by the payment of money or of wool at the rate of twenty cents per pound?

In any other view these expressions ought not to be in the instrument, and we would be forced to disregard their plain import, and to decide that they were inserted without any object. This we are not at liberty, upon any just principle of construction, to do.

That an agreement to pay \$1,500 in wool, at twenty cents per pound, may be discharged by the payment of that sum in money, that that sum is the measure of damages if the wool be not delivered, is, we think, the law, both on reason and authority. We are aware that there are decisions that the market value of the wool is the measure of damages, but we do not think they are sound. Upon this question, the rule of the civil law is thus stated in Pothier on Obligations, No. 497: "All agreements to pay in specific articles are presumed to be made *in favor of the debtor*, and he may, in all cases, pay the *amount of the debt* in money in lieu of the articles which, by the terms of the contract, the creditor had agreed to receive, instead of money."

With perhaps some qualification of the generality of this language, this is also the rule of the common law.

In Chipman on Contracts, 35, it is said: "If A give B a note for \$100, payable at a future day, in wheat at 75 cents per bushel, and wheat on the day of payment be \$1 per bushel, A may, at his election, pay in wheat at 75 cents per bushel, or \$100 in money."

To the same effect are Perry v. Smith, 22 Vt. 301; Smith v. Smith, 2 Johns. 235; Pinney v. Gleason, 5 Wend. 393; Brooks v. Hubbard, 3 Conn. 58; Baber v. Mair, 12 Mass. 121; Mettler v. Moore, 1 Black. 342.

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45] *A collection of the authorities on both sides of this question may be found in 2 Parsons on Contracts, 490.

In this state, we think that the rule to which we hold has always prevailed.

Bill dismissed.

JOSEPH BLOOM AND OTHERS v. SAMUEL NOGGLE AND OTHERS.

N. being largely indebted, and in an amount beyond the value of all his property, made an agreement in writing with four of his creditors, by which he bound himself to execute a mortgage to one of them, who agreed to sign notes as surety to the others, upon certain real estate for the security of all the claims; and, at the same time, delivered to the agent of the creditors certain title papers to the property agreed to be mortgaged. N., afterward refusing to perform the agreement, made a general assignment of his property for the benefit of all his creditors. Upon a bill filed to compel the execution of the mortgage, and to set aside the assignment, or give these creditors a paramount lien upon the property: *Held*—

1. That the agreement created no lien upon the land in favor of the complainants, as against other creditors, deriving an interest under the assignment.
2. Upon general equity principles, unaffected by statutory provisions, an agreement in writing, for a mortgage, is a valid contract, fixing a specific lien upon the property; and will be specifically enforced by a court of chancery against the party, and all subsequent purchasers from him with notice, as well as against any general assignment, either voluntary or by operation of law, for the benefit of his creditors.
3. As between the parties to such a contract, the agreement is valid and effectual in this state, and a specific performance may be enforced.
4. But no effect whatever can be given to it, consistently with section 7 of the act of June 1, 1831, to provide for the proof, acknowledgment, and recording of deeds, etc., as against third persons who have subsequently acquired the legal title to, or a lien at law upon, the property to which it relates.
5. By the positive provisions of that section, as construed by the declaratory 46] *act of March 16, 1838, and repeated decisions of this court, as against such third persons, mortgages have no effect, either at law or in equity, until delivered to the recorder of the proper county for record.
6. The legal rights of such persons can not be displaced at the instance of the holder of a prior unrecorded mortgage, or contract for a mortgage, although acquired with notice of such mortgage, or of the existence of such contract; the object of the law being to avoid all the vexed questions of notice, actual or constructive, in determining priorities of lien.
7. A creditor of an insolvent debtor, or one having assumed liabilities for him as surety, may lawfully take from him a mortgage to secure such debt, or save

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harmless from such liability; and, as the reward of such diligence, will be protected in the priority thus obtained.

8. But if he attempts to extend the lien beyond the necessity of his own indemnity, and secure the debt of any other creditor, the mortgage is, in substance and legal effect, an assignment within the provisions of the act of 1838, relating to assignments by insolvent debtors; and the mortgagee, being a trustee for such other creditor, under that act, becomes a trustee for all the creditors of the mortgagor.
9. This act can not be evaded by assuming a liability as surety for the insolvent debtor, as a part of the transaction by which the mortgage is taken. If, in this case, therefore, the mortgage had been executed, or should be now decreed, the security would inure to the benefit of all the creditors of the mortgagor.

In chancery, reserved in the district court in Darke county.

The facts of this case, so far as it is necessary to state them, are as follows:

Noggle was indebted to complainants, February 22, 1849, as follows:

"To Stewart & Galligher.....	\$1,690 00
J. & J. Slevin.....	648 14
Joseph Bloom.....	278 28
Hiram Bloom.....	390 42
	<hr/>
	\$3,006 94"

C. C. Waldo was indebted to Noggle in \$1,131—of which \$200 *were payable on demand, \$465.50 in twelve months, and [47 \$465.50 in sixteen months, without interest. No notes were executed for this indebtedness. Noggle was at the time mentioned heavily embarrassed by indebtedness to other persons as well as the complainants. On the day first mentioned, a memorandum of agreement was made and signed as follows:

"This memorandum witnesseth, that, whereas, Samuel Noggle is indebted to Joseph Bloom, Stewart & Galligher, J. & J. Slevin, and Hiram Bloom, and said Samuel Noggle proposes to give said creditors security, if they give him time, or to such as may give time; it is therefore understood and agreed as follows: that said Samuel Noggle shall pay Stewart & Galligher one note due on C. C. Waldo for \$200, one note on same in sixteen months for \$465.50, subject to discount of interest due, and balance of their claim, not exceeding nine hundred and fifty dollars (\$950), the precise amount not known now, but includes the claim due on the 1st of March by J. Bloom

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and G. Noggle's note, in three installments, payable in nine, fifteen, and twenty-one months, with interest; and said Noggle shall pay said J. & J. Slevin a note on said C. C. Waldo, due in twelve months, calling for \$465.50, subject to discount until due, and balance of their claim, not exceeding two hundred and seventy-five dollars, but precise amount not known, to be paid to said Bloom and G. Noggle's note in fifteen months, with interest, \$225. And said Noggle to pay said Joseph Bloom his claim, not exceeding three hundred dollars, within fifteen months, with interest. And said Noggle to paid said Hiram Bloom his claim, not exceeding four hundred and fifty dollars (\$450), by said Joseph Bloom and G. Noggle's notes, in three installments, payable in nine, fifteen, and twenty-one months with interest; and the said Joseph Bloom agrees that if said creditors, all, or so many as do accept said proposition, to give his notes accordingly with said George Noggle, or on his refusal, then his own note; provided, that said Samuel Noggle shall execute a good and sufficient mortgage to said Bloom on said Noggle's farm in Darke county, where he lives, with his wife's release of dower, to cover and secure the full payment of all such sums as said Bloom becomes responsible for, and also Bloom's own claims; and the same to be fixed and arranged as soon as said Stewart & Galligher have been written to and given their assent; and Hiram Bell, as agent for all the parties, to hold Noggle's title-deeds until the same is fully arranged.

"SAMUEL NOGGLE,

"JOSEPH BLOOM,

"T. W. BRISTOL,

"For Stewart & Galligher, if they affirm.

"DANIEL LAW,

"February 22, 1849. For J. & J. Slevin, if by them approved."

48] *"So far as I am concerned in the above agreement, I assent and agree to the same. "C. C. WALDO."

About the 14th of February, 1849, Noggle had made a deed of the same land to Young, his son-in-law, for a nominal consideration of \$3,600, none of which was paid, and Young had executed a mortgage (but, the bill avers, no notes) to Noggle, for annual installments of \$200 each. The deed and mortgage last mentioned had been filed for record by Noggle, and by Noggle's order were lifted from the recorder by H. Bell, who continued to hold them when the bill was filed, for the benefit of the creditors, it being agreed that the Young mortgage should be held for the benefit of these creditors, until the above arrangement should be perfected, Noggle representing that Young was willing to reconvey to him or to complainants. The arrangement between Noggle and complain-

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ants was to be completed as soon as Stewart & Galligher and the Slevins should assent to the acts of their agents, but the failure of either of these creditors to ratify was not to affect the others.

On the 23d of February, the agents of Stewart & Galligher and J. & J. Slevin informed Noggle that they were ready to complete the arrangement. On the 26th and 27th of February, Noggle was notified of the readiness of complainants to perfect the arrangement, and specific performance was tendered by them, but Noggle refused on his part. Early in the morning of February 26th, Young was notified of the transfer of the mortgage and deed and of the above arrangement; he assented, and was willing to reconvey.

February 27th, Noggle assigned all his effects, real and personal, to Collins and Frizell for the benefit of all his creditors. The bill charges this assignment to be fraudulent.

The prayer of the bill is, that Waldo be decreed to pay his notes to complainants, according to the agreement; that Noggle be decreed to execute a mortgage, or the claims be made a lien on the land; or, if specific performance be impossible, that Young be decreed to pay his mortgage to complainants.

*It appears from the answer, that the Young deed and [49 mortgage are treated by the parties to them as canceled; that there were notes taken from Young by Noggle for the purchase money, and that these were afterward delivered up to Young, "and the deed and mortgage both canceled." Noggle admits his refusal to execute the agreement for a mortgage; says that at the time he signed the writing he was pressed by the importunities of complainant's agents to sign it; but that, upon reflection, he determined not to secure those particular creditors to the injury of other creditors who have claims on him equally just.

There are charges of actual fraud on both sides; and some testimony is taken on that subject; but the decision of the court is such as to render unnecessary a full statement of that part of the case.

Bell & Lyman, for complainants, made the following points:

1. The agreement for a mortgage between Noggle and complainants, creates as between them, a mortgage or lien in equity, good against subsequent assignees for the benefit of all the creditors. Sir Simeon Stewart's case, reported in *Burn v. Burn*, 3 Ves. Jr. 573 (also referred to in 2 Sch. & Lef. 381); in the matter of *Howe*,

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1 Paige, 125 (referring to *Burg & Burg v. Francis*, 1 Eq. Cas. Abr. 320); *Delaire v. Keenan*, 3 Dess. 74; *Finch v. Earl of Winchelsea* —; *Foster v. Foust*, 2 Serg. & Raw. 11; *Hurst v. Hurst*, 2 Wash. Ch. C. 69; *Sugd. Vend.* 336; 2 *Cruise Dig.* 64, tit. Estate by Stat. Mer.

2. The deposit with H. Bell, of Noggle's title deeds, would and did of itself, independent of any further agreement, create a lien on Noggle's land to the extent for which they were deposited. 2 *Story's Eq. Juris.*, secs. 1020, 1021; *Cross' Law of Lien*, 109, 112, 26, 113, 115, 117, 118; *Coate on Mortgages*, Law Lib., vol. 16, 84, 87; *Walker's Amer. Law*, 315; *Johnson v. Parkhurst*, 4 *Wend.* 369.

50] *3. The right of the creditor to take security for his debt from a debtor in failing circumstances, is too well established in Ohio to be controverted. *Doremus et al. v. O'Harra et al.*, 1 *Ohio St.* 45; *Atkinson v. Tomlinson*, *Ib.* 237.

4. The assignees of an insolvent debtor take his estate subject to all the equity chargeable on it in the hands of the debtor. (See citations under No. 1 of these points.) *White v. Denman*, 1 *Ohio St.* 110.

W. Collins, for defendants.

1. There is no absolute contract, but merely a proposition, suspended for the assent of complainants. When Noggle reflected on the unjust results, he declined, and so notified the other party.

2. If the agreement, such as it is, had been executed, at least in relation to the farm, the complainants would, under our statute, be in equity trustees for the benefit of all the creditors.

3. A decree for specific performance will not be granted, unless the contract be fair, just, and equitable in all its circumstances, and will work no injustice to any one. To decree specific performance in this case would work manifest injustice to many other creditors.

To these points were cited: 5 *Ohio*, 179; 4 *Johns. Ch.* 528; 12 *Ohio*, 335; 13 *Ib.* 40; 2 *Story's Eq. Juris.*, secs. 750, 769; *Holcomb's Eq.* 124; 10 *Ohio*, 233; *Livingston's Monthly Law Mag.*, vol. 1, No. 2, p. 116.

The other points of counsel refer to the questions of actual fraud.

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RANNEY, J., delivered the opinion of the court.

This bill is prosecuted to enforce the specific execution of an agreement made by the defendant, Noggle, with the complainants, by which he undertook to execute and deliver to the complainant, Joseph Bloom, a mortgage upon certain real estate in *Darke [51 county, to secure the payment of certain debts then due and owing by him to them. As a part of the same agreement, upon the execution and delivery of this mortgage, Bloom bound himself to sign as surety with Noggle, or if the latter refused, to execute his own notes to the other complainants for the amount of their claims respectively, and to hold the mortgaged property for his indemnity.

In the decision of the case we make no question that this agreement was fully perfected and entered into without fraud or oppression; and that the title afterward conveyed to the assignees for the benefit of all Noggle's creditors, was received by them with full notice of its existence.

On the other hand, it can not be doubted that Noggle, at the time he made the agreement, was in a state of absolute insolvency, nor that it was made with a view of preferring the complainants to his other creditors. The questions arising are: can the legal title to the property be taken from the general assignees, by decreeing a specific execution of this agreement? and if a court of equity has this power, can it secure to the complainants the paramount lien they claim?

If the case could be decided upon general principles, the right of the complainants to the relief they seek would seem to us as clear as it now seems clear that it can not be given consistently with statutory provisions bearing upon the questions stated.

Upon general equity principles, unaffected by statutory provisions, an agreement in writing for a mortgage, is a valid contract, fixing a specific lien upon the property agreed to be mortgaged, and will be specifically enforced by a court of chancery, against the party and all subsequent purchasers from him with notice, as well as against any general assignment, either voluntary or by operation of law, for the benefit of his creditors. These principles may be regarded as well settled, and the jurisdiction of courts of equity in such cases has been exercised, without question, from a very early period, as is abundantly shown by *the cases cited in argument. It [52 rests upon the same foundation and has all the reasons for its sup-

port, that exist in favor of a like interference upon contracts for the execution and delivery of absolute deeds.

As between the parties to such a contract, the agreement is valid and effectual in this state, and we see no reason to doubt that a specific performance may be enforced by our courts of chancery, in the same manner and to the same extent, that such relief has been given in England, and other states of the Union.

But while these principles and remedies have their full application and effect, as between the parties to such a contract, we are clear in the opinion that no effect whatever can be given to it consistently with section 7 of the act of June 1, 1831 (Swan's Rev. Stat. 310), to provide for the proof, acknowledgment, and recording deeds, etc., as against third persons who have subsequently acquired the legal title to, or a lien at law upon, the property to which it relates.

By the positive provisions of that section, as construed by the declaratory act of March 16, 1838 (Swan's Rev. Stat. 311), and repeated decisions of this court, as against such third persons, mortgages have no effect either at law or in equity until delivered to the recorder of the proper county for record.

By the first-named section it is provided that mortgages "shall take effect from the time when the same are recorded;" and by the last, after reciting that doubts had arisen whether "deeds of mortgage take effect from the time the same are delivered to the recorder of the proper county for record, or from the time the same are actually copied into the book of records," it is declared "that mortgage deeds do and shall take effect and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered on record."

In the numerous cases that have arisen since the passage of these statutes, almost every variety of unrecorded instrument, operating 53] by way of mortgage upon real estate, has been passed *upon; but in no single instance have the subsequently acquired legal rights of third persons been displaced by such instruments, whether such rights existed by deed, mortgage, judgment lien, or levy upon the property.

In *Stansell v. Roberts*, 13 Ohio, 148, the question arose between a prior unrecorded and subsequent recorded mortgage, the second mortgagee having notice of the first mortgage, and the lien of the latter was preferred. It is admitted that a different result would

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have ensued upon general chancery principles, by the application of the doctrine of earlier equities; but the court considered the case settled by the statute, and as the legislature had declared the effect of notice in the section relating to absolute deeds, and had omitted any such declaration in that relating to mortgages, they thought "the expression of the consequences of notice in one class of deeds, and the omission of it as to the other, a plain indication that the legislature did not mean to give the protection arising from it, except to the class of deeds to which it is expressly attached."

In each of the cases of *Mayhan v. Coombs*, 14 Ohio, 428; *Jackson v. Luce*, *Ib.* 514; *White v. Denman*, 16 Ohio, 59; S. C., in review, 1 Ohio St. 110, and *Holliday v. The Franklin Bank of Columbus*, 16 Ohio, 533, the contest arose between an unrecorded mortgage, or one defectively executed, so as not to be entitled to record, and a subsequent judgment lien; and in each of them the lien of the judgment was preferred. While in the case of *Fosdick v. Barr*, 3 Ohio St. 471, the same preference was given to a levy upon execution issued upon a judgment rendered in another county, and having no lien upon the property.

No one of these cases was decided in ignorance of the general principles to which we have alluded, and in every one of them a different conclusion would have been arrived at, if these principles could have furnished the rules of adjudication. But it was perfectly competent for the legislature to change or modify these *rules, [54 and when it had done so, no discretion was left to the judicial tribunals to depart from the express commands of the legislative body. Those commands the courts have regarded as explicit; the statute expressly declaring, that mortgages do and shall take effect and have preference, "from the time the same are delivered to the recorder of the proper county, to be by him entered on record." To give them any effect before, as against the persons intended to be protected by this statute, would be to repeal it. It was not made for the mortgagor, and therefore, as to him, the record of the mortgage was wholly unnecessary; but it was designed to protect third persons who might acquire legal interests in, or liens upon, the property. As to them, the record was made conclusive; and they are only bound to regard such mortgage liens as the record discloses at the time their rights accrue. The principle deducible from all the cases is, that the legal rights of such persons can not

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be displaced, at the instance of the holder of a prior unrecorded mortgage, or contract for a mortgage, although acquired with notice of such mortgage, or of the existence of such contract; the object of the law being to avoid all the vexed questions of notice, actual or constructive, in determining priorities of lien. So far as may be necessary to their protection, such a thing as an equitable mortgage is wholly unknown.

Until entered for record, they have no effect either at law or in equity against third persons; and until they take effect as legal instruments, they are entirely inoperative to prevent others from acquiring uncontrollable legal interests in the property. The lien they give is governed by the statute, and only attaches when the statute has been complied with. The record gives them vitality, and the record alone can be appealed to to determine when they have taken effect.

The doctrine of earlier equities only applies when the contesting interest is only an equity; but when that has been clothed with legal protection, it can not be displaced by anything short of a prior duly recorded instrument.

55] *I am quite ready to admit, that the propriety of extending these doctrines, to the protection of subsequent judgment liens, might well have been doubted. Ordinarily such liens only attach to the interests of the debtor in the property; and hence it was urged with much force, that as these unrecorded mortgages and contracts were effectual against the party, they ought to be equally so against the judgment creditor, who took his place and succeeded to his rights. If this were an open question, the argument would be entitled to great weight; and I am not prepared to say that I should not consider it altogether sound. But the opposite course of decision has been too long and uniformly maintained, to be now disturbed, without involving consequences vastly more injurious than can arise from adhering to it.

A question of less doubt might also be made, whether a subsequent mortgagee or purchaser with notice, could take a conveyance of the legal title, without committing a fraud upon the holder of the prior equitable right. But this, too, has been long since settled, upon what was considered a fair construction of the statute. At first view, it seems inequitable to permit this to be done; but it is to be remembered that if notice is permitted to supply the place of the registry, the whole field of constructive notice immediately ap-

plies; or if it is made to depend upon actual notice, the inquiry is still attended with all the danger and uncertainty incident to parol evidence, when used for the purpose of affecting written instruments, and disturbing titles.

A very limited experience will serve to satisfy any one, that there is no more fruitful source of litigation, and none in which the results are more uncertain and unsatisfactory.

It may, therefore, well be doubted, whether a sound public policy does not require the establishment of a clear and certain standard of decision, incapable of vibration, and free from the evils of litigation, uncertainty, and fraud, by making it all depend upon a simple matter of fact, of easy solution, and allowing every thing to be settled by the priority of the registry. Some of the *most emi- [56] nent and experienced chancellors have been of this opinion; and the courts of this state have always supposed, that this was the policy intended to be established by the legislature. If they have been mistaken in this, the mistake is now too deeply rooted, to be remedied by the judicial tribunals. Nothing short of a more explicit declaration of the legislative will, and applicable alone to future cases, can remedy the evil, if such it is.

Whether, therefore, we consider the general assignees in this case as purchasers for a valuable consideration, or as holding the legal title in trust for the benefit of all the creditors, it is equally clear that it can not be taken from them by the complainants. A contract for a mortgage can not have greater effect than one defectively executed, or one perfectly executed, but not recorded.

It is unnecessary to consider the effect of depositing the title papers, or whether consistently with our recording acts, such a deposit is sufficient to satisfy the statute of frauds. At most it could operate only as an agreement for a mortgage, and at best could be no better than a written contract. 2 Story's Eq., sections 1020, 1021; Johnson v. Parkhurst, 4 Wend. 369.

There is another conclusive view of this case. If the mortgage had been executed according to the agreement, or should be now decreed, we are clear in the opinion that it would inure to the benefit of all the creditors of the mortgagor, under the provisions of the act of March 14, 1838, relating to assignments by insolvent debtors, and that the proceeds of the mortgaged property would be carried precisely where they are now left by the general assignment.

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It is very true that it has been fully settled by repeated decisions of this court, that a creditor of an insolvent debtor, or one having assumed liabilities for him as surety, may lawfully take from him a mortgage to secure such debt, or save harmless from such liability; and, as the reward of his diligence, will be protected in the priority thus obtained. *Doremus v. O'Hara*, 1 Ohio St. 45; *Atkinson v. Tomlinson*, Ib. 237.

57] *But it is equally well settled, that if he attempts to extend the lien beyond the necessity of his own indemnity, and secure the debt of any other creditor, the mortgage is in substance and legal effect an assignment within the provisions of that act; and the mortgagee being a trustee for such other creditor, under the act becomes a trustee for all the creditors of the mortgagor. Our reasons for holding such a mortgage an assignment within the purview of the law, are stated in the case of *Harkrader v. Crane*, decided at the present term.

This would have been exactly the position of the mortgagee in this case. He not only attempted to secure himself, but several other creditors of the mortgagor; and while it is true that he agreed to become security for their debts, we have no difficulty in saying that this act can not be evaded by assuming a liability as surety for the insolvent debtor, as a part of the transaction by which the mortgage is taken, and a priority be thus secured.

In any view the bill must be dismissed, saving to the complainants such rights as they may have under the general assignment.

JOHN DAILEY v. THE STATE OF OHIO.

Section 42 of an "act defining the jurisdiction and regulating the practice of probate courts," passed March 14, 1853, providing that, "upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the probate judge shall proceed to try the issue," is a valid and constitutional enactment.

A record showing that the accused "did not demand a jury," sufficiently shows a waiver of the trial by jury.

ERROR to the probate court of Lucas county.

Dailey v. State of Ohio.

The proceedings in the probate court were upon an information for selling intoxicating liquors, other, etc., contrary to the provisions *of an act to provide against the evils resulting from the sale [58 of intoxicating liquors, passed May 1, 1854.

After setting out the information, the records shows the arraignment of Dailey, and his plea of not guilty, and proceeds: "And thereupon the case went to trial, and defendant not demanding a jury, and the court, after hearing the proofs and allegations, did find the said John Dailey guilty, as set forth in the first count of the information against him, but not guilty as to the second count. Whereupon," etc.

The defendant moved in arrest of judgment, but the motion was overruled, and the defendant was sentenced to fine and imprisonment.

To reverse this sentence, the present writ of error was sued out.

James Murray, for plaintiff in error:

I. The supposed law under which these proceedings were had was unconstitutional. (This argument was submitted before the decision of *Miller v. State*, 3 Ohio St. 475.)

II. The record shows no sufficient waiver of a trial by jury. A court can not try such a cause without an express waiver, apparent in the record. The waiver will not be presumed.

No argument was submitted for the state.

KENNON, J., delivered the opinion of the court.

I. As to the first question raised by counsel, this court, in the case of *Miller v. State*, 3 Ohio St. 475, has already decided in favor of the constitutionality of the law, and being fully satisfied with that decision, we feel no disposition to reconsider it.

II. Is the statute, authorizing the probate judge to try the issue upon a plea of not guilty, constitutional? By section 5 of the bill of rights, in our present constitution, it is provided *that [59 the right of trial by jury shall be inviolate. By section 10, it is provided that in any trial, in any court, the party accused shall be allowed to have a speedy public trial by an impartial jury.

The probate act confers certain criminal jurisdiction on the probate court, and then provides that, upon a plea other than a plea of

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guilty, if the defendant does not demand a trial by jury, the probate judge shall proceed to try the issue. Swan's Stat. 732.

Does this act in any sense interfere with the right of trial by a jury? If the act had provided, in express terms, that the accused might have his own choice of two modes of trial, either by the court or jury, as he might think proper, and if he supposed the court the safer mode of trial, should expressly waive his right of trial by jury, and request that the court should try the issue, it would be hard to see how his right of trial by jury was violated. The provision of the constitution was intended to limit the power of the legislature in this particular, and prohibit it from depriving the accused of the right to have a jury of twelve impartial men to pass on his guilt or innocence. That right still exists; all he has to do is to demand a jury trial, and the law awards it to him; but if he will not demand such trial, then the law authorizes the judge to try the issue. The law says to the accused, in language which can not be misunderstood, "if you wish to exercise your right to a jury trial, your right can not be violated; but if you would rather not be tried by a jury, you can waive that right, and be tried by the court. If you do not demand a jury, you shall be considered as waiving your right." The accused does not demand a jury, but submits to be tried by the court; and after trial, and after he is found guilty, says "I have been deprived of my right of jury trial." But who deprived him of that right? Surely, not the court nor the statute: he has clearly waived his right, and then claims that the law is unconstitutional and void because it permitted him to do so.

60] *We are of opinion that the statute deprived him of none of his constitutional rights, and is therefore not unconstitutional.

The judgment is affirmed.

A. MERRICK v. J. BOURY & SONS.

The findings of a court, when substituted for a jury, are entitled to the same consideration as the verdict of the latter; and it is well settled that a verdict will not be set aside, upon the ground of erroneous finding, unless it is clear that such is the case.

It is only by force of an agreement of the parties, that the giving of an un-

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sealed note by the debtor will be payment of a precedent debt. The burden of proof is upon the debtor, who must establish the agreement clearly; and the question whether there was such an agreement, is one of fact to be determined by the jury.

A vendee of goods, subsequently to the purchase, gave his note for the price, but it was not received as payment. Afterward, the vendors, to whom it was payable, without any fraudulent purpose, and under an honest mistake of right, materially altered it. *Held*, that such alteration did not preclude a recovery upon the original cause of action, the precedent indebtedness.

IN ERROR to the district court of Muskingum county.

The record presents the following facts:

In 1851, Merrick was indebted to Boury & Sons for goods sold and delivered. Some difficulty or difference having arisen between the parties in relation to the price, character, and quantity of the goods sent to Merrick by Boury & Sons, Merrick, on the 17th of July, 1851, wrote to Boury & Sons, among other things, as follows: "On the 22d of December, 1850, I received your dispatch, authorizing me to retain the goods on a year's credit. On the 22d of December, 1851, I will therefore *pay you the balance due*, \$548.04, but no more; and if you choose to call on Messrs. Slingluff & Ensey, 13 N. Howard street, they will hand *you my note for that [61 amount, in full of account to date—not that I consider that amount due you in equity, but because I said *I would pay you that much*."

On the 7th of August, 1851, Boury & Sons answered the above letter, and wrote to Merrick on that day, acknowledging the receipt of his of July 17, 1851, in which, among other things, they say to Merrick: "We have *signed the receipt* transmitted through Messrs. Slingluff & Ensey, and the note received of them for \$548.04, has been duly passed to your credit; and as you are aware that our invariable custom is to make all drafts, notes, etc., due us, payable, with difference of exchange, on Baltimore, we have taken the liberty to add this small item to said note, not doubting it will fully meet your approval."

This letter was received by Merrick, no reply made to it, and nothing more heard of the matter until about the time the note became due, when it was sent to the bank in Zanesville, where Merrick resided, for collection. When the note was due, Merrick called at the bank and offered to pay the amount, but not the difference of exchange. This the cashier refused to receive, and the note was returned to the payees. After this Merrick refused to pay

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anything. Thereupon suit was brought; the declaration containing a count on the note, and the common counts, on the first of which judgment was given for Merrick, and on the latter, a judgment rendered in the common pleas for the amount admitted to be due Boury & Sons, by the letter of Merrick. An appeal was taken by him to the district court, where again judgment was rendered against him as above; and to reverse this judgment, this petition in error is brought.

L. P. Marsh, for plaintiff in error:

I. A promissory note may not operate as payment of an open account, unless it is given and received in payment. In the absence of express proof, the object of giving such note may be determined from the attending circumstances. If given in payment 62] *of a pre-existing debt, it operates as an *extinguishment* of such original debt, upon which no action can thereafter be maintained, the holder being left to pursue his remedy upon the note alone. Story on Prom. Notes, sec. 104; *Riley & Van Amringe v. Anderson*, 2 McLean, 594.

II. In the absence of any express agreement, or agreement implied from the attending circumstances, that a note is given in payment of a pre-existing debt, it not unfrequently, as in this case, may be held to effect an *accord and satisfaction* of such pre-existing debt. *Harper v. Graham*, 20 Ohio, 117, citing *Brooks v. White*, 2 Met. 285; *Sibree v. Tripp*, 15 Mee. & Welsb. 37; *Boyd v. Hitchcock*, 20 Johns. 76.

III. If the note was given in payment, or if there was effected an accord and satisfaction of the original open account, the plaintiffs can only recover upon the note. The note was altered in a material part by the plaintiffs, after they received it, and such alteration was without the knowledge or consent of the defendant: this avoids the note, and does not revive the original account. Being void for one purpose, the note is void for all purposes, and is incompetent evidence. *Martindale v. Follet*, 1 N. H. 99, and cases there cited.

IV. The fraudulent alteration of a note in a material part by the holder, not only avoids the note, but prevents a recovery upon its original consideration. *Master v. Miller*, 4 D. & E. 329.

V. No recovery can be had upon the note for two reasons: 1. Because the note as altered is not the contract executed by the defendant; 2. Because of the fraudulent alteration.

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VI. The fraudulent intent is *presumed*; the legal effect is a fraud upon the defendant, unless the alteration is made with his knowledge and consent.

Counsel cited : *Anderson v. Langdale*, 23 Eng. C. L. — ; 2 Barn. & Adol. 660 ; 10 Missouri, 348 ; *Newell v. Mayberry*, 3 Leigh, 250 ; *Mills v. Starr*, 2 Bailey, 359 ; 2 Barb. Ch. 120, and notes and cases there cited.

**Geo. James*, for defendants in error.

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I. That the note of even the original debtor may be given to the original creditor in payment of a pre-existing debt, and is so *received* in payment by the creditor, will be payment, there is no doubt. But it must be clearly shown that such was the intention ; as between the original parties, the giving of the note of the debtor is never presumed to be in payment. 1 Cow. 359 ; *Porter v. Talent*, Ib. 290.

II. But this question was one of *fact*, submitted to the court as though to a jury, and they have found against the supposed intention ; and the question can not be reinvestigated on a writ of error.

III. Every alteration of such an instrument as that here in question does not render it absolutely void, for all purposes, and as to all parties. The instrument is not affected unless the alteration be material, and not then, if the alteration was made before it was issued, or to correct a mistake ; or by the consent of the parties (*Smith Merc. L. 266*), or to make instruments conform to the original intention of the parties (3 Shepl. 357 ; 1 Denio, 239 ; 10 Wend. 93) ; or if made with an honest intention. 15 Pick. 239 ; 20 Vt. 205 ; *Beatman v. Russel*, 18 Ib. 466 ; *Miller v. Greenleaf*, Penn. 4 (citing 1 Greenl. 73, 334 ; 8 Conn. 75 ; 1 Shepl. 386 ; 2 Mason, 478 ; 6 Ala. 513 ; 8 Dana, 98 ; 2 N. H. 543, and other cases) ; *Provost v. Gratz*, 6 Wheat. 502 ; *Nevins v. DeGrand*, 15 Mass. 436 ; *Thornton v. Appleton*, 29 Maine, 298 ; *Rollins v. Bartlett*, 9 Shepl. 317 ; 3 Barr. 379 ; *Adams v. Frye*, 3 Met. 109. That a material alteration may vitiate the note or bond as to some of the parties, but not as to others, see in *State v. Van Pelt*, 1 Smith, 118 ; *Prevost v. Brown*, 2 Dougl. 9 ; *Davis v. Coleman*, 7 Iredel, 424.

Counsel also cited *Waring v. Smith*, 2 Barb. Ch. 119 ; 3 Barb. S. C. 484 ; 1 Greenl. 7 ; 8 Cow. 71 ; 22 Wend. 388 ; *Agriculturist etc. v. Fitzgerald*, 4 Eng. Law and Eq. 349.

IV. The alteration, though it may vitiate the instrument of

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64] *writing, yet does not prevent the party from recovering on the original consideration, where such consideration existed prior to, and is independent of, the instrument of writing—is not merged in, or discharged by, such instrument; or when the debt, duty, or obligation, is not created by the instrument—but it is given merely as evidence of such consideration. *Atkinson v. Hawden*, 6 Adol. and El. 728; *Sloman v. Cox*, 1 Comp. Mee. and Rosc. 471; *Suttan v. Toomer*, 7 Barn. and Cresw. 416; *Smith's Merc. Law*, 266, Note R.; *Clude v. Smale*, 17 Wend. 238; *Chitty on Bills*, 6 Am. ed. 100.

V. It is doing no violence to the evidence or facts stated in the bill of exceptions, to say that the court properly inferred the assent of Merrick to the alteration. In the very letter in which Boury & Sons acknowledge the receipt of the note, they inform him of the alteration, and he never objects to it, until after the note is due. Six months after it was made, and when the note became due, with a full knowledge of the alteration, he went to the bank and acknowledged his liability, by offering to pay it, without the difference of exchange. This is very similar to the case of *Humphreys v. Guillon*, 13 N. H. 385.

VI. Assent may be before or after alteration, and proved by parol. 9 Cranch, 28; 4 Johns. 54. It may be implied from the nature of the alteration, and from the custom or mode of business between the parties, 2 N. H. 545. The letter of Boury shows that the alteration was made to conform the note to what was usual between the parties, and with what they presumed to be the assent of Merrick.

THURMAN, C. J. The errors assigned amount in substance to this, that the evidence did not support the action, and hence, Merrick's motion for a new trial was improperly overruled, and the judgment against him improperly given.

The special count in the declaration was upon the note as altered, and as the court found for Merrick, upon this count, they 65] *must have held that the alteration was made without his authority, and was never ratified by him. But whether the verdict for Boury & Sons, upon the common counts, was upon the note as it existed previous to the alteration, or upon its consideration, the original indebtedness, does not appear by the record. Let it have been upon either, or even upon the note in its altered shape, the common counts were entirely sufficient, and the judgment can not

be disturbed, unless the verdict was clearly against the evidence. Thus, if the verdict can be sustained only upon the grounds that the note was not taken in payment of the antecedent debt, and that the alteration was made without any fraudulent purpose, it must be presumed, upon a petition in error, that these facts were found by the court, and this finding will not be disturbed merely because we might doubt its correctness. The findings of a court, when substituted for a jury, are entitled to the same consideration as the verdict of the latter; and it is well settled that a verdict will not be set aside upon the ground of an erroneous finding, unless it is clear that such is the case. We are inclined to think, however, that there is no necessity, in the present case, for an application of this rule; for we can hardly say that the testimony would warrant a finding that the note was taken as payment, and as to the alteration, we see no reason at all to believe that it was made with a fraudulent intent.

In *Porter v. Talcott*, 1 Cow. 380, it is said: "The law is well settled, that a note given by the debtor for a precedent debt, is no payment of the original demand, unless it is *expressly* agreed to receive it in payment;" and this is the doctrine of very many cases. See *Tobey v. Barbor*, 5 Johns. 72, and the cases there cited. In *Johnson v. Weed*, 9 Johns. 310, it was held, that the agreement must be "clear and special," otherwise the paper will be no payment.

On the other hand, it has been ruled, that "the object of giving a note may as well be ascertained from circumstances as from an express agreement." *Riley & Van Amringe v. Anderson*, 2 *McLean, 594, and the same doctrine is asserted in *Story on Promissory Notes*, sec. 104.

But whatever may be the law of evidence, nearly all the cases concur in holding that it is only by force of an agreement of the parties, that the giving of an unsealed note by the debtor will be a payment; that the burden of proof is upon the debtor, who must establish the agreement clearly; and that the question whether there was such an agreement is one of fact, to be determined by the jury.

How then stands the present case? It is not pretended that there was any proof of an *express* agreement that the note should be payment, and we think it must be held that it is not *clearly* inferable from the circumstances. From what can it be inferred?

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The answer of counsel is: "That the plaintiffs proposed to extend the credit to December 22, 1851; to this the defendant acceded, and sent them his negotiable note, payable at that time for a less sum than the plaintiffs claimed to be due, stating in his letter that he would pay that sum in full of account, if the plaintiffs chose to call for his note, and no more. The plaintiffs received the note, and say, in a letter subsequently written, "we have passed it to your credit."

That there was an extension of credit, as here supposed, is not clearly established by the testimony, for it does not appear when the original indebtedness was payable, nor that it was payable before the time fixed for the maturity of the note. But let that be granted, and it by no means follows, as a necessary consequence, that the note was taken in payment. Speaking upon this point the Supreme Court of New York, in *Tobey v. Barber*, *supra*, said: "He [the creditor] is not obliged to sue upon it [the note]. He may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt, until a default be made in the payment of the note." And in *Clark v. Young, Cranch*, 181, it was held that "it was not necessary for the plaintiff to offer to return the note, to entitle him to bring suit for the goods sold."

67] *That the note was negotiable is a circumstance entitled to no weight in this inquiry. In almost every case of this nature, to be found in the books, the note or bill was negotiable.

That it was for a smaller sum than the creditors claimed, is undoubtedly true, but that it was for less than the amount actually due, does not appear. It was for precisely the amount which the plaintiff in error said was "the balance due," though he thought it too large "in justice or equity by \$150." What significance, then, has the fact that it was for less than the amount claimed? Plainly no more than this, that the creditors agreed to accept the sum admitted to be due. It has no bearing upon the question whether they agreed to take the note in payment of that sum.

But were it admitted that the note was for less than the actual indebtedness, it was for the court, to whom the cause was submitted, to decide whether there was an accord and satisfaction that extinguished the original debt, or whether the creditors merely relinquished a part of their claim, and took the note as a collateral security for the residue; and if they were of the latter opinion, we can

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not say, upon the testimony, that they were clearly in the wrong.

That the note was "passed to the credit" of the maker—by which we understand that it was put to his credit on the creditors' books—is, in our judgment, a very slight circumstance; and just what usually takes place when a note is given to a merchant. A receipt in full of the original account is a much more pregnant instrument, and yet that is not conclusive that payment was made (5 J. R. 72). It may be sufficient to shift the burden of proof to the creditor, and possibly would have done so in this case had the receipt that was given been produced. But it was not produced, and therefore Boury & Sons were under no necessity of explaining it; indeed, its non-production by Merrick raises a presumption that its terms were unfavorable to his defense.

Upon the whole, as before said, there was no proof of an *ex- 68 press agreement that the note should be payment, nor can such an agreement—or, what is substantially the same thing, an accord and satisfaction that extinguished the precedent debt—be clearly inferred from the circumstances of the case. It follows, that a judgment might well be rendered upon the original indebtedness, unless the alteration of the note not only destroyed it, but also the original cause of action. That it had that effect, is ably contended by counsel, and, in support of his point, he cites the following authorities; *Master v. Miller*, 4 D. & E. 329; *Alderson v. Langdale*, 3 Barn. & Adol. 660; *Martindale v. Follett*, 1 N. H. 95; *Whitmer v. Frye*, 10 Missouri, 348; *Newell v. Mayberry*, 3 Leigh, 250; *Mills v. Starr*, 2 Bailey, 359; and *Waring v. Smith*, 2 Barb. Ch. 119.

The case of *Master v. Miller* is not in point. It was an action by an indorsee against the acceptor of a bill of exchange, which had been materially altered while in the hands of the payees, and before the indorsement.

The main question was, whether the rule that an alteration, in a material part, of a deed, avoids it, applied to instruments not under seal. And the court held that it did. Kenyon also held that the plaintiff could not recover upon the ground of money paid by the payees to the acceptor, or had and received by the latter for the use of the former, because such a right of action was not assignable. He intimated, however, that possibly an action might be framed to give the plaintiff some remedy. Grose, J., thought there could be no recovery upon the general counts, "because it is not stated as a

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fact in the verdict that the defendant received the money, the value of the bill." Ashhurst, J., expressed no opinion on this point, while Buller, J., maintained, that the plaintiff was entitled to recover, either on the bill in its original shape, or on the money counts.

The case of *Alderson v. Langdale* was this: "The vendee of goods paid for them by a bill of exchange drawn by him on a third 69] *person, and after it had been accepted the vendor altered the time of payment mentioned in the bill, and thereby vitiated it. Held, that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and that consequently he could not recover for the goods sold." The court likened the case to that in which the holder of a bill "makes it his own by laches, as by not presenting it for payment when due," and upon that principle held that the plaintiff could not recover. It is very evident, therefore, that the ground of the decision was the injury done to the drawer by the release of the acceptor, and that ground is no doubt quite sufficient. But here no third person has been released, and no injury is done to Merrick by compelling him to pay what he justly owes.

In *Whitner v. Frye*, the alteration was of a bond. Of course there was no original cause of action to fall back upon. If a precedent debt formed the consideration of the bond, it was merged in it, because it was under seal. If there was no precedent liability, then the bond created the only liability that ever existed, and that being avoided by the alteration, there could be no recovery.

The same remarks apply to the case of *Waring v. Smyth*, in which the alteration was of a bond and mortgage; and to *Miller v. Starr*, in which a note *under seal* was altered.

The cases of *Newell v. Mayberry*, and *Martendale v. Follett*, in effect decide nothing more than that where a written contract has been fraudulently altered, the party guilty of the alteration can not recover upon the contract as it existed before it was altered. Neither of them was a case where there was a precedent liability; in each case the only contract between the parties was the written one that was altered, and that being vitiated by the alteration, it was very properly held, that there could be no recovery. It is not to be denied, however, that the language of the judge who delivered the opinion in *Martendale v. Follett*, goes somewhat further, and, unless 70] restricted to the facts of that case, *might seem to support the present defense. But before we yield our assent to a decision that

is not binding upon us as authority, we must be satisfied of its correctness, and if this is true in respect to decisions, *a fortiori* it is true in regard to *dicta*.

It is thus apparent that neither of the cases cited by the plaintiff in error is directly in point, and to the reasons already given why they are not so, may be added another, namely, that in neither of them was the presumption of a *fraudulent* alteration rebutted by the proofs.

But the case of *Atkinson v. Hawdon*, 2 Add. & Ell. 628, 29 Eng. Com. Law, 169, is directly in point, and fully sustains the judgment under consideration. It was an action of assumpsit by vendor against vendee, and the declaration contained two counts, one upon a bill of exchange that had been given by the vendee for the price of the goods, and the other for goods sold and delivered. The bill had been materially altered by the payee, the vendor, without the privity or assent of the drawer, the vendee. Held that the bill was thereby vitiated, but that the plaintiff was entitled to recover upon the common count.

This case was approved and followed by the Supreme Court of New York, in *Clute & Bailey v. Small*, 17 Wend. 238, the court adding, however, that "for aught that appeared, the alteration was made under an honest mistake of right." And this qualification the court appears to have thought was necessary, holding, it would seem, that when the alteration is in fact fraudulent there ought to be no recovery, but that when made without any fraudulent purpose there may be a recovery upon the original cause of action.

We have no hesitation in going to this extent, and upon principle, do not see how it can be avoided. It is difficult to perceive how the destruction without fraud, of a mere security given by the debtor himself, and the destruction of which can in no event prejudice him, can operate to discharge the precedent debt. Inasmuch then as we are well satisfied that the alteration in *question [71] was made under an honest mistake of right, we are of the opinion that the plaintiffs below were entitled to recover, upon the original cause of action, the amount admitted to be due and for which the note was given. Whether they could have recovered upon the note as it existed before the alteration, is a question upon which we express no opinion. Many authorities are cited by the defendant in error to show that, as the alteration was not fraudulent, there could be such a recovery, but it is unnecessary to consider them. It may

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be as well to remark, however, that tampering with a security, however honestly, is a dangerous thing, and ought not to be encouraged.

Judgment affirmed.

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Where a lease for years is made of land, without any reservation in the lease itself of a growing crop, parol evidence may be introduced to show that the crop was growing on the land, at the time when the lease was made, and was treated and considered as personalty, and not intended to be conveyed by the lease. In the sale of real estate in fee or for years, the growing crops may be considered by the parties as personal property, and so separated in contemplation of law as not to pass by the deed or lease. *Baker v. Jordan*, 3 Ohio St. 438, followed and approved.

Where a special plea of a former trial between the same parties, upon the same point sought to be litigated, is pleaded, and where it becomes necessary to introduce parol evidence, to show that the two causes of action were the same, the identity of the causes of action in the two cases, is a matter of fact for a jury, to be determined upon the evidence.

When a motion to the court, to set aside the finding of a jury, or the court, upon such issue, because the finding was against the evidence, is overruled, the bill of exceptions must show what was the evidence upon which said finding was founded; otherwise, a court of error can not determine whether the court below erred or not. It is not sufficient to say that *evidence* was given of such and such facts on the trial of the issue.

72] *PETITION in error, to reverse a judgment of the district court in Licking county.

The case is fully stated in the opinion of the court.

Chas. Follett, for plaintiff in error.

I. The parol testimony of reservation should not have been received.* Nothing but a clear, subsequent, independent agreement could change the written lease; and parol testimony can not be given to change or vary a written contract, nor even to explain the understanding of the parties at the time of making it. *Case v. Winship*, 4 Blackf. 425; *Zwillinger v. Webb*, 9 West. Law Journal

*This case was argued before the decision of *Baker v. Jordan*.

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310 (No. 7); *Edwards v. Richards*, Wright, 597; *State v. Perry*, Ib. 662; *Morris v. Edwards*, 1 Ohio, 189; *Stone v. Vance*, 6 Ib. 246; 1 Greenl. on Ev. 398, 275, 276.

II. The court not only erred in admitting parol testimony to be given to prove title to the wheat, by reservation, as against the lease, but the rule of *res adjudicata* forbade its introduction. Whether it sufficiently appears in the pleadings or not, that the former suit in trespass was determined upon the merits, can make no difference, as it distinctly appears by the testimony set out in the bill of exceptions, that the question of title by reservation, and no other, was given to the jury and insisted upon, to entitle the plaintiffs to a recovery therein, and a verdict and judgment against the plaintiff, as the record shows. *Gardner v. Buckbee*, 3 Cow. 120; *Burt v. Sternburgh*, 4 Cow. 559; *Bouchand, Ex. of Brunel v. Lewis*, 3 Denio, 238; 1 Greenl. on Ev., sec. 533; *Doty v. Brown*, 4 Comst. 71.

III. It can not be said, that the title to the wheat was not, or could not be, called in question in the action of trespass, or that trespass was not the proper action. Either the wheat belonged to the plaintiff, or did not; if the former, then the defendant's *pos- [73 session was forcible, and he a trespasser in entering and cutting down the same, and the first taking wrongful; and trespass was the proper remedy. 7 Ohio (part 2), 133; 10 Johns. 369; 7 Ib. 140; 17 Ib. 116; 5 Mass. 283; 284; 3 Hill, 282. And, indeed, if the defendant had entered and ousted the owner of said field of wheat, and continued in possession of the premises, trespass *quare clausum faegit* is the only remedy. But if the entry was lawful, the property of the wheat was in the defendant. *De Mott and Billson v. Hagerman*, 8 Cow. 220; 2 Wheat. Selw. 1195, notes B and C; *Brown v. Caldwell*, 10 Serg. & R. 114; *Mather v. Trinity Church*, 3 Ib. 509.

Smythe & Sprague, for defendants in error.

I. The court will look in vain for any order in this case, making the bill of exceptions, or what purports to be a bill of exceptions, part of the record. The bill of exceptions can not, therefore, be considered. *Baldwin v. State*, 6 Ohio, 15; *Acheson et al. v. Western Reserve Bank*, 8 Ohio, 117.

II. As to the admission of parol evidence to explain or vary the written contract, counsel for defendants in error do not deem it necessary to controvert any of the principles or authorities referred

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to in the argument of plaintiff's counsel; they simply deny that any such thing was done. The writing produced by plaintiff in error, and called a contract, was disregarded by the court below, for two reasons—

1. It fully appeared, and is stated in the bill of exceptions, that the plaintiffs below were minors at the time of signing the writing, and therefore were not bound by it. As to them it was no contract, and, so far as the matter in controversy was concerned, they had repudiated it by bringing their action.

2. The writing did not purport upon its face to be a contract *inter partes*, but simply the contract of Youmans. True, it was signed by the others; but its stipulations are all in the singular number, and 74] point wholly and exclusively to Youmans. There is in the writing no stipulation, engagement, or undertaking on the part of defendants in error; the mere act of signing, in such circumstances, would not make it the whole contract of all the parties, so as to exclude reservations made on behalf of the defendants in error.

III. Whether the former judgment would be a bar or not, depended entirely upon the identity of the subject decided in the former action, with the controversy in this; a question of fact, depending not on the record of the former judgment alone, but upon that with the other testimony in the case. The finding of the court of common pleas on this subject is that of a fact, and no error of law is or can be predicated upon it. The court of error can not review and reverse this finding of the fact, especially when the bill of exceptions does not pretend to set out all the evidence. It seems to be well settled, that such a thing can not be done. 14 Ohio, 586.

Mr. Follett, in reply:

I. The bill of exceptions is part of the record. The case in 6 Ohio has no application; that in 8 Ohio does not go to the extent claimed by defendants in error; it only decides what is usual or good practice. The case last named has not the slightest intimation that where a bill of exception *has been made* a part of the record, it is to be disregarded for want of an express order making it such. But, even if that decision has the supposed extent, the language of the statute of 1845, 2 Curw. 1140, under which the bill of exceptions in this case was made, is imperative, upon the request of the party, and no order is necessary for that purpose. If not made a part of

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the record, the consequences follow which are shown in 6 and 8 Ohio; but once of record, the court can not disregard it.

II. Upon the question of infancy the defendants are *estopped*. This lease was not void, but voidable only; and although they might have re-entered and ousted the plaintiff, until they did that *or put an end to the term in some other way, they could not [75 take the crops. Their tenant was permitted to enter and occupy under the lease, and he paid rent; the crops were his own, with which his landlord had nothing to do. Infancy is not allowed to protect fraudulent acts. 3 Kent, 239; Kitchen v. Lee, 11 Paige, 107; Badger v. Phinney, 15 Mass. 179; Roberts v. Wiggin, 1 N. H. 73; Roof v. Stafford, 7 Cow. 179; Hamblett v. Hamblett, 6 N. H. 339; Smith v. Evans, 5 Humph. 70; Kitchen v. Lee, N. Y. Ch. 3; N. Y. Legal Obs. 160; Zouch v. Parsons, 3 Bur. 1794; 2 Kent, 236; 1 Johns. Cas. 127; 5 Yerg. 41; Tucker et al. v. Moreland, 10 Pet. (U. S.) 66; Baylis v. Lumley, 3 Maule & Sel. 477; Lesse of Drake and wife v. Ramsey et al., 5 Ohio, 251; 14 Johns. 124; 4 Day, 51.

III. Any statement in writing containing the agreement between the parties, and accepted and adopted by them, is the best and only evidence of the contract, even although not signed by the parties at all. But where, as in this case, the statement is signed and sealed by all the parties to the contract, in duplicate, there can be no more binding agreement. Patchin v. Swift, 6 Washb. 292.

IV. All the testimony given on the trial is set out in the bill of exceptions, and counsel for plaintiff in error think the language of the bill sufficiently shows that fact, to wit: "The plaintiffs offered no further evidence in chief, but rested their case," etc. "And the defendant offered no other or further evidence in this case," etc. But this is not material. The bill sets out the testimony with sufficient clearness to enable the court to decide all that is necessary in determining the cause.

KENNON J. The Caldwells had brought an action of replevin to recover some wheat which had been cut down and put in shock by Youmans, upon a tract of land leased to Youmans by the Caldwells, at the yearly rent of two hundred dollars and taxes. The wheat in controversy had been sown, and was growing on the land, at the time the lease was made to Youmans. There was *about [76 fifteen or sixteen acres of the wheat, making about 225 or 230 bushels. Youmans claimed the wheat by virtue of his lease, and

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the Caldwells claimed that it belonged to them, and was reserved when the lease was executed. The lease contained no express reservation of the wheat.

The question of title to the wheat was, therefore, the matter in controversy. The Caldwells recovered in the court of common pleas, and upon writ of error, the district court affirmed the judgment of the common pleas.

This petition was filed to reverse the judgment of the district court.

Upon the trial of the case in the court of common pleas, the Caldwells gave in evidence their title to the land upon which the wheat grew, and rested. Youmans gave in evidence his lease to the land, bearing date prior to the time of cutting the wheat, and that he had gone into possession of the farm on the first of April preceding the harvest at which the wheat was cut. The Caldwells then gave evidence that the wheat was growing on the ground when the lease was made, and offered to prove that the wheat was reserved when they made the lease. To this evidence Youmans objected, but the court overruled the objection and admitted the evidence. To this ruling of the court Youmans excepted, and procured his bill of exceptions to be signed by the court. Youmans had filed a special plea, setting forth that before the suit was brought, the Caldwells had brought an action of trespass for the identical cause of action for which the action of replevin had been prosecuted; that, upon the trial of the trespass, judgment had been rendered against the said Caldwells, and that the judgment so rendered was still in full force. The trial of the trespass was before a justice of the peace.

On the trial of the action of replevin in the common pleas, the issues were submitted to the court; one of which issues was, whether the cause of action was the same in the trespass and replevin suits. 77] *To support the issue on the part of Youmans, he gave in evidence the transcript of the judgment before the justice, which of itself did not show that the same points were in issue in both cases; but Youmans offered to the court parol evidence to show that the identical same matter tried before the justice and then determined, was that in issue in the action of replevin. The court, however, found that the said supposed action of trespass in said plea mentioned, was not for the same identical cause of action as in said declaration mentioned. The finding is in these words: "And the court do further find, that the said supposed action of tres-

pass in said defendant's plea mentioned, was not for the same identical cause of action as in said declaration mentioned, and the judgment in said action of trespass mentioned, was not upon, or for the same cause of action as in said declaration mentioned."

Judgment was rendered for the plaintiffs, and the defendant moved for a new trial for the reasons: 1. That the court erred in overruling the objection made by the defendant to the evidence offered by the plaintiffs to vary or explain the written agreement; 2. In finding that the plaintiffs were not barred by said action of trespass so decided against them; and, 3. The court erred in not nonsuiting the plaintiffs.

This motion was overruled by the court of common pleas. To this opinion of the court of common pleas the defendant also excepted.

The bill of exceptions, among other things, states that the defendant "gave evidence" of certain facts (named in the bill of exceptions) which, if satisfactorily *proved* to the court, might have been a bar to the plaintiffs' right of recovery.

The questions, therefore, presented on this record are: 1. Should the court have nonsuited the plaintiffs? 2. Did the court err in not finding that the facts proved showed that the action of trespass and replevin, were for the same identical cause of action? 3. Did the court err in admitting the plaintiffs to prove that the *wheat was sown before the lease was made, and that the [78 plaintiffs, by parol, reserved the wheat to themselves?

As to the first question, it can not be seriously claimed that the plaintiffs, after proving title in themselves to the land, and that the wheat grew upon that land, ought to have been nonsuited. The plaintiffs made a *prima facie* case for recovery, and therefore, the court did not err in refusing to nonsuit them.

As to the second question, we are, from the bill of exceptions, unable to say whether the court ought to have found the facts differently or not. Had the finding been by a jury, negating the facts in the special plea, and a motion had been made to the court to set aside the verdict because it was against the evidence, and the court had overruled that motion, a court of error could not have said that the court erred, unless all the evidence which the jury had before them, had been fully set out, that we might judge whether the verdict was decidedly against the weight of the evidence. It would not do to say that evidence was given to the jury of such

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facts. The jury may or may not have believed the evidence, and in this respect it makes no difference whether the issue was found by the jury or by the court. If all the *testimony* had been set out, or if it appeared that the facts outside of the justice's record had been *proved*, showing that it was for the identical same cause of action as that on trial, a different case would have been presented; but when the bill of exceptions only shows that *evidence* was given to the court of these facts, and the court expressly find that the facts stated in the plea of *estoppel* are not true, there is no ground for this court to say that the *parol* evidence *proved* that the two causes of action were the same. We are therefore of opinion that in this particular, the district court did not err in refusing to reverse the judgment of the common pleas.

The remaining is a very important question, and one which this court, at its present term, fully considered in the case of *Baker v. 79] Jordan*. In that case, Jordan purchased of Baker a *farm; Baker, a few days after the parol contract for the sale of the farm, executed a deed to Baker for the land, without any reservation of the crops. There was, at the time of the execution of the deed, about seventy acres of corn growing on the land, which, by express agreement, was to belong to the grantor, and not the grantee in the deed; it was by parol reserved, and the question was whether that fact could be proved in an action by the grantor for the corn; or whether such proof would not vary or contradict the deed itself. In that case the court held that such evidence was admissible. A growing crop may or may not be a part of the realty. It may be sold without writing, and the title pass; it may be levied upon by execution as personal property, and in certain cases passes to the administrator.

By the deed the *realty* passed, and *prima facie* the corn was realty; if so, it passed; but if, before the execution of the deed, the parties themselves so separated the land from the corn as to constitute it personalty, it would not pass by the deed; and therefore full effect was given to the deed without including the corn. 3 Ohio St. 438.

In the case now before this court we regard the paper given in evidence by Youmans, as a lease creating in him a lien for years, an interest or estate in the *land* itself, which could not be created or pass without writing. The wheat would pass by a mere parol contract, and the lessee by the lease acquired such an interest in the land by the lease as would *prima facie* have passed to him this

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growing wheat; but it passed only because it might be and generally is considered as a part of the realty. But if the parties, by agreement before or at the time of making the lease, reserved the wheat, that agreement had the effect, as between the lessors and the lessee, to convert the wheat into personalty; and therefore the wheat did not, in fact, pass by the lease, so that the lease may have its full effect in passing the realty without passing the wheat. We hold the effect of reserving the growing crop to be, that the parties themselves have, without writing, agreed to convert it into [80 personalty, and it so remains, and does not therefore pass by the deed creating an interest in the land. We are, therefore, of opinion that the district court did not err in refusing to reverse the judgment of the common pleas.

The judgment of the district court affirmed.

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Municipal corporations are liable for injuries to third persons, resulting from the negligence of subordinate officers or agents acting under their authority and direction, in the construction of public improvements belonging to such corporations.

In such cases, the maxim *respondet superior*, properly applies, in the same manner and to the same extent, as in its application to the liabilities of private individuals.

But where such agent or officer, although appointed by the corporation, performs duties for or between individuals, in which the corporation has no interest, no such liability arises, and the officer alone is responsible.

The damages to be recovered in such action, must be the immediate, natural, and necessary result of the negligence or want of skill complained of.

ERROR to the court of common pleas of Montgomery county, reserved in the district court for decision here.

The original proceeding was an action on the case for consequential damages to the mill of Horace Pease, defendant in error. It was commenced before a justice of the peace. Judgment was rendered by him in favor of Pease, and an appeal taken to the Montgomery common pleas by the city. At the November term, 1852, the demurrer was withdrawn as to the first count of the dec-

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laration and overruled as to the second. On issue joined at the 81] same term, a special verdict was rendered *by the jury. On error to the district court for Montgomery county, the case was reserved to this court for decision.

The declaration contains two counts. The first sets forth that the plaintiff was possessed (in October, 1851) of a certain mill in Dayton, on the Miami canal, and a certain water-power of so many cubic feet per minute; and the right to flow the same through the canal to his mill, and from and below the same, through the said canal. That the defendant, on the 30th of October, 1851, etc., etc., "*wrongfully and injuriously*" erected an arched stone bridge across the canal below said mill, and in the city, and constructed the same "*so inartificially*" that it fell into the canal and dammed up the water, and thereby obstructed and prevented the plaintiff from the use of his mill, and from making divers profits, etc., etc.

The second count differs from the first, only, in alleging that the defendant "*wrongfully and injuriously, by certain contractors for that purpose by the defendant employed,*" erected the bridge in the first count mentioned.

At the trial, the plaintiff so amended his declaration as to conform it to the proof of drawing off the water from the canal above the mill, as set forth in specification number five (5) of the special verdict.

The plea is the general issue—"Not guilty."

The jury, being instructed that they might find a special verdict and assess the damages sustained by the plaintiff, did find—

1. That the mill mentioned in the declaration was the mill of the plaintiff; that he owned and used the water-power, and had the right to flow water from said mill through the Miami canal.

2. That the city of Dayton, by order of the common council, did contract with certain contractors to erect a stone bridge over said canal, as by law the city had a right and was bound to do, below said mill, on Warren street, under the supervision of the city engineer, and according to a plan to be furnished by him; *that said contractors did erect such bridge, in pursuance of a plan afterward furnished by said engineer.

3. That on the afternoon of the 30th of October, 1851, said bridge fell into the canal.

4. That the fall thereof was owing to defect and *inartificiality* in the plan of the bridge, as furnished by said engineer; which plan

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was defective and inartificial through the negligence and unskillfulness in devising the same, of the said engineer, and was such that the bridge could not stand.

5. That, by reason of the stone and earth falling into the canal, the water was dammed and backed up on the wheels of plaintiff's said mill, which stopped its working for a period of seven hours; and that by reason of said fall of stone and earth, and for the purpose of removing the same, it became necessary to draw the water off the level of the canal above the mill, whereby it was stopped for a period of twenty-three hours longer.

6. That immediately after the fall of said bridge, on the same day, the city of Dayton proposed to remove from the canal the obstruction to the same occasioned thereby; but that the removal thereof was at once taken off their hands by the superintendent of repairs on that line of said canal, who forthwith took charge of the same, and proceeded to take the necessary steps to remove said obstruction.

7. That directly after the fall of the bridge—on the same day—the said superintendent of repairs directed the water in the level above the mill to be drawn off, for the purpose of enabling him to remove the said obstruction from out the canal, and that the water was so drawn off; whereby the mill of the plaintiff was stopped for the period of twenty-three hours, as aforesaid.

8. That said bridge was upon Warren street, a public highway and street in Dayton, which was originally part of a state road, laid out and established as such road by the county commissioners, in 1806 or 1807, and which became one of the streets of the town of Dayton in 1812 or 1813; that there was at both these *pe- [88] riods, and until the construction of the said canal, a swamp or marsh directly on the line where the canal now runs; and a bridge of logs at the point on said road or street, where said stone bridge was erected.

9. That the Miami canal was constructed about the year 1829, and a wooden bridge erected over the same pursuant to law, which bridge fell down and was removed some time in the spring of 1851; and that the stone bridge was erected at the same point on the canal where the old bridge stood.

And if the court should be of opinion that on these several facts thus found, the law was with the plaintiff, then, and in that case, the plaintiff's damage to be assessed at the sum of sixteen dollars

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and fifty cents, by reason of the damming and backing up of the water upon the wheels of the plaintiff's mill as aforesaid; and the further sum of fifty-four dollars and seventy-two cents, by reason of the water having been drawn off from the level above the mill of the plaintiff as aforesaid. But if the law were with the defendant, then, and in that case, the defendant to go hence without day, and recover from the plaintiff its costs, taxed at ——— dollars and ——— cents.

And thereupon the parties, by their attorneys, agreed in open court, that, in pronouncing judgment upon said findings of, the jury, the court should also look to, consider, and take judicial notice of the charter of the said city of Dayton, and all acts of the legislature amendatory thereto, or conferring power upon and regulating the duties and liabilities of the city and its officers, and of all the ordinances and minutes of the proceedings of the city council, in so far as they severally relate in any way to the matters in controversy—the same as though each and all were parts of the general laws of the state, or had been respectively and severally pleaded and given in evidence to the court and jury.

84] **Copies of the proceedings of the city council, referred to in the above entry, and agreed upon by counsel of both parties.*

January 11, 1851.—D. H. Morrison was then elected city engineer for the current year.

June 5, 1851.—Resolution, by Mr. Kenney, that the marshal, in conjunction with the city engineer, have the bridge on Warren street repaired, and that the work be let to the lowest bidder for cash.

June 20, 1851.—Mr. Kenney, from the committee to whom was referred the matter of repairing Warren street bridge across the canal, reported that said bridge since the last meeting has fallen down, and offered a resolution that the city engineer be required to make an estimate of a stone bridge of rough masonry, also of a wooden bridge, and that he advertise for proposals for building the same. Report accepted, and resolution adopted.

August 8, 1851.—Resolution, by Mr. Kenney, that the bids for building a stone bridge across the canal at Warren street be referred to a committee of two. in connection with the city engineer, and

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that they be authorized to contract for the building of said bridge, with the lowest responsible bidder. Laid over.

August 11, 1851.—Mr. Comly offered the following as an amendment to Mr. Kenney's resolution : That the committee on the Warren street bridge report to council the gross amount of each bid for the work on said bridge, before the contract for the same is awarded. Amendment adopted, and the resolution as amended passed. Committee—Messrs. Boren, Worman, and Beichler.

August 18, 1851.—The city engineer reported concerning the several amounts of bids for building Warren street stone bridge. On motion, the work was awarded to Marcus Bosler, exclusive of embankment, for \$1,155.79.

November 17, 1851.—Resolution, by Mr. Kenney, that the committee on Warren street bridge report to council the full particulars *in reference to the contract and full amount paid on said [85 bridge; also, that the city engineer furnish statement of the reason why said bridge did not stand, and where the fault lies in the premises. Committee—Boren, Beichler, and Worman.

Horace Pease presented claim for damages sustained by him in the stoppage of his mill, as he alleges, by reason of the falling of Warren street bridge into the canal. Ordered that said bill be returned to Mr. Pease.

December 15, 1851.—Mr. Bosler submitted statement concerning the falling of the Warren street stone bridge. Laid over till next meeting.

February 6, 1852.—Committee on Warren street bridge reported progress, and asked further time. Granted.

March 3, 1852.—Communication from Wm. Trebein, notifying council to remove stone and rubbish accumulated on the towing-path on the canal, at the Warren street crossing, was then read. Mr. Love moved that the matter be referred to the bridge committee, to report at next meeting. Carried.

May 18, 1852.—Resolution, by Mr. Kenney, that the trustees of the Fourth ward be authorized to have the stone abutments of Warren street bridge built preparatory to the erection of a wooden rafter bridge; provided, the building of said abutments does not cost to exceed \$100; and provided further, that the canal commissioners appropriate sufficient to build said bridge. Adopted.

The city charter and ordinances.—Counsel bring also into court and

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file with brief, a printed volume, containing the charter and ordinances of the city of Dayton; and refer therein especially:

1. To the act of the legislature creating the office of "city engineer," requiring the city council to appoint, or provide for his election by the people, and fixing the term of office. Charter, etc., pp. 9, 10.

86] *2. To the ordinance prescribing his duties, requiring oath of office, fixing a salary, etc. Charter, etc., pp. 48, 49.

C. L. Vallandigham made the following points in argument for plaintiff in error:

I. (1.) A mere *private* corporation, exercising mere *private and strictly corporate* powers, is liable for injuries *occasioned by or resulting from* the exercises of *such* powers, in like manner as an individual; but

(2.) A mere private corporation, exercising *public* powers—powers belonging to and usually exercised by government (*e. g.* the case of turnpikes, canal, railroad companies, etc.)—is not liable, either in England, or in most of the states of this Union, or under the federal government, for injuries resulting from or occasioned by the exercise of such powers, *except* it act *itself* illegally (exceeding its jurisdiction) or wantonly, maliciously, or negligently in their exercise. 2 Broom's Maxims, 373-389; Story on Agency, sec. 319, et seq.; 1 Am. Law Mag. 66; Plate Glass Company v. Meredith, 4 Term, 794; Boulton v. Crowther, 2 B. & C. 703 (9 Eng. C. L. 227); Sutton v. Clarke, 6 Taunt. 29 (1 Eng. C. L. 298); Hall v. Smith et al., 2 Bing. 156 (9 Eng. C. L. 357); Harris et ux. v. Baker, 4 M. S. 27; Duncan v. Findlater, 6 Clark & Fin. 903; The Queen v. Eastern Counties Railway, 1 Gale & Dav. 589; Callender v. Marsh, 1 Pick. 418; Steel v. The West Lock Nav. Co., 2 Johns. 286; Parker v. The Cuttler Milldam Co., 7 Shep. 353; Lansing v. Smith, 8 Cow. 146. See also the earlier Ohio cases.

(3.) And so even in the case of a *private individual*, exercising a like power, by special grant. Calking v. Baldwin, 4 Wend. 667.

NOTE.—Some of the other cases above cited, are cases where *individuals* exercised the powers, but assuredly there can be no sufficient reason for distinguishing between public acts done by an individual officer or body of individual officers, and the *same* acts done for *same purposes*, by a corporation—especially a *municipi-*

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pal corporation. And see 1 H. & W. Am. Lead. Cases, 645 ; 3 Hill, 531 ; Story on Agency, sec. 321.

II. A public and political or *quasi* corporation proper—"a body politic and corporate," in the language of the Ohio statutes (Swan's Stat. 205, sec. 7 ; 827, sec. 7 ; 949, sec. 1), *e. g.* a county or township—is not liable for injuries occasioned by or resulting from the lawful exercise of its lawful powers.

NOTE.—"A city is in some respects a county." *Stetson v. Faxon*, 19 Pick. 152.

III. (1.) Though a municipal corporation, exercising *mere private* and *strictly corporate* powers, and for its *own pleasure, benefit, and emolument*, is liable for injuries occasioned by or resulting from the exercise of *such* powers, in cases where the acts producing the injuries are *directly done or commanded by itself*, in like manner as an individual.

(2.) Yet it is *not* in like case liable *where* the powers exercised are *public and political* and *quasi* corporate, and not for its own exclusive benefit and emolument, *unless* it exercise such powers *illegally or maliciously*, or occasion injury in the exercise thereof by *its own direct negligence*.

As above, especially Story on Agency, sec. 319, *et seq.* ; also, 1 Hare & Wal. Amer. Lead. Cas. 645 ; *Fowler v. The Com. Council of Alexandria*, 3 Pet. 398 ; *Humes v. The Mayor, etc.*, 1 Humph. 403 ; *Bailey v. New York*, 3 Hill, 531 ; *New York v. Bailey*, 2 Denio, 434.

NOTE.—As to the Ohio cases bearing on this point, the counsel for plaintiff in error maintains that, though the latter do not profess to overrule the earlier, and indeed deny any such purpose, there is nevertheless a conflict, direct and irreconcilable, between them ; and that these later cases are unsupported by any authorities, English or American, and are manifestly against principle. And, further, that they do not at all decide the question involved in the case at bar. (See fifth proposition.)

IV. A municipal corporation is not liable, any more than an individual would be, for injuries *maliciously or wantonly committed*

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88] *by its servants, the maxim "*respondeat superior*" not here applying.

V. (1.) Though municipal corporations are liable—like any other public officer—in all cases, for injuries resulting from *their own direct* negligence and carelessness, in even the legal exercise of as well public as mere private and strictly corporate powers :

(2.) Yet, when exercising lawfully, even mere private and strictly corporate powers, they are *not* liable, *even in Ohio*, certainly not elsewhere, for injuries resulting purely from the negligence or unskillfulness of their *officers* in executing the acts ordered to be done; unless, indeed, the person executing the act, stand in the relation of a *mere private servant or deputy*.

(3.) Nor, *a multo fortiori*, are they in a like case liable, *where* the powers exercised are of a public and political or *quasi* corporate kind, and not employed for the mere private pleasure, benefit, or emolument of the corporation, where they act as public officers, and not as mere corporators. 1 Hare & Wal. Amer. Lead. Cas. 645; Paley on Agency, 300; Story on Agency, secs. 319-457; Hall v. Smith et al., 9 Eng. C. L. 357; Harris and wife v. Baker, 4 M. S. 27; Martin v. Mayor, etc., of Brooklyn, 1 Hill, 545; Bailey v. New York, 3 Hill, 530; The Mayor, etc., of New York v. Furze, 3 Hill, 612; Same v. Bailey, 2 Denio, 434. And see Connell v. Voorhees, 13 Ohio, 523, with the comments in 1 Hare & Wal. 645.

NOTE.—The counsel for the plaintiff in error maintains that this proposition puts the case at bar—if the facts bring it within the proposition—beyond the cases decided in 10, 15, and 18 Ohio.

Applying these propositions to the case at bar, the counsel for the plaintiff in error further argues:

I. That the building of bridges is, from its nature, the exercise of a public and political, and *not* a mere and strictly corporate power.

89] *NOTE.—It was so regarded by both ancient and modern governments. It formed part of the *trinoda necessitas*, attaching of old to every man's estate, to wit: *Expediitio contra hostem; arcium constructio; pontium reparatio*. So also at Rome, no man was exempt from the duty—*nullum genus hominum, nulliusque dignitatis ac venerationis meritis*. And in Ohio it devolves, except in special cases, upon counties and townships.

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II. That the city of Dayton, in building bridges, acts, under our statutes, as a *public officer*, being substituted for the county commissioners and township trustees, and not in the exercise of a mere and usual corporate franchise. Swan's Stat. of '41, p. 165, sec. 8; 177, sec. 15; 206, sec. 10; 808, secs. 70, 71; 810, sec. 74; 811, sec. 79; 813, secs. 87, 90: and compare city charter, p. 27, sec. 2.

NOTE.—This was an ancient bridge, on an ancient state road. It was not a toll-bridge, nor built for mere pleasure, ornament, emolument, or benefit of the city, but being a *canal bridge*, the city was bound to build it. Swan's Stat. 165, sec. 8, and 177, sec. 15; and special verdict, specification number 2. Nor, further, was the city using and improving *its own property*, nor property of which it had the control. It belonged to the state.

III. That the city having thus the right, and being bound to build the bridge, did not, in building it, act illegally or exceed its jurisdiction. Nor yet did it act maliciously.

NOTE.—The injury complained of was not caused by the doing of the act ordered by the city, to wit: the *building* of the bridge; nor did it even result consequentially (strictly speaking) from the *building*, but the *fall* of the bridge. Nor yet was it occasioned by, or result from negligence or unskillfulness in, the city itself (as if, *e. g.*, the city council had itself devised the plan), but from the fall of the bridge, which fall was occasioned by the negligence and unskillfulness, or mistake rather, of the city engineer; neither the fall nor negligence being ordered, countenanced or contemplated by the city.

And this consideration, especially, distinguishes this from every and all the cases where cities have been held liable.

IV. The city engineer is a public *ministerial officer* of the municipality, and not a mere private servant, employe, or deputy thereof; but bearing a relation to the city similar to that which the county surveyor sustains to the county. *Ante*, p. 4; and see *Knight v. Fox & Henderson*, 1 L. & Eq. 477.

*NOTE 1.—The case of a ship-master *compellable* to take a [90] pilot, for whose negligence he is not liable, is not without analogy. *Story on Agency*, sec. 456a.

NOTE 2.—The fact that the city appoints the engineer, does not affect the question. *Paley on Agency*, 300; note *p*; *Canterbury v. The Attorney-General*, 1 Phil. 306; *Lane v. Cotton*, 1 Salk. 17, and

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1 Hill 545, *ut supra*. See also the case of a stage-driver appointed by the mail-contractor, *Connell v. Voorhees*, 13 Ohio, 523.

V. The argument by analogy and *ab inconvenienti*, applies here with peculiar force, since the city must be liable for all the mistakes and negligences of all its other officers also—its assessors, weighers, measurers, marshals, market-masters, health officers, fire-wardens, city jailer, supervisors, night watch, etc., etc., throughout the list.

VI. That as to the loss occasioned to the defendant in error, by the drawing off the water in the level *above* his mill (which was the act of the superintendent of repairs on the canal), the city is clearly not liable, even aside from the principles hereinbefore noted; because, although the drawing off the water was brought about by the building and subsequent fall of the bridge, these were only the remote cause of the loss to the defendant in error—quite too remote to be the subject of an action; the proximate cause was the drawing off the water, by one in nowise the agent or employe of the city.

Summary.—I. That in building the bridge in question, the city of Dayton acted as a public officer of the state, lawfully discharging her public duties in like manner as a county commissioner or township trustee in a like case.

II. That a public officer, acting in the lawful discharge of his public duties, is not responsible for the negligence or unskillfulness of those whom he is obliged to employ as public, though subordinate, officers under him.

III. That the city engineer of Dayton is such public, though 91] *subordinate, officer, acting in a public capacity, and not a mere private service.

IV. And that, therefore, the city is not liable for his negligence or want of skill.

Haynes & Howard, for defendant in error:

I. Municipal corporations are liable, like individuals, for injuries done by them, though the act be not beyond their lawful powers. They are created to enable a body of people to act, as an individual could, for the convenience and profit of all; sue and be sued, and, generally, to carry into effect any object of interest to those who belong to it. If the property of any one must be taken for the benefit of all, a fair compensation must be made to him in money. It is no less a duty to make good a loss resulting from their acts—

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a consequential damage. This case is stronger than the case of Rhodes v. Cleveland, 10 Ohio, 159.

Under this head, counsel cite also Smith v. Cincinnati, 4 Ohio, 514; McComb v. Akron, 15 Ib. 474; Akron v. McComb, 18 Ib. 229.

II. There is no conflict between these and the earlier Ohio cases. In Scovill v. Giddings, and Hickox v. Cleveland, the points could not arise. In the first case, the suit was against *agents* of the corporation for doing what the corporation might legally do, and had ordered them to do: the law authorized the acts, and the corporation, not the agents, was liable for the injury. In Hickox v. Cleveland, there was a special provision in the law providing for the assessment of damages. When that is the case, the party must resort to the remedy which is given him.

III. Counsel also rely on the following American cases: Thayer v. Boston, 14 Pick. 115; Stetson v. Faxon, Ib. 141; Baron et al. v. Baltimore, 2 Amer. Jur. 203;—cited and approved in 18 Ohio, 233. Also, Bailey v. New York, 3 Hill, 531; New York v. Bailey, 2 Denio, 434. The English cases cited by *plaintiff in error, [92 can only be sustained on the ground, that the defendants were independent officers of the British government, discharging their duties without fault; the government being the superior, the rule, *respondeat superior*, did not apply.

IV. Under the ordinance for the appointment of a city engineer, the counsel did not comply with their whole duty in the matter. The ordinance is as follows:

"Sec. 1. The city council of Dayton ordain, that the said city council shall annually appoint some suitable and competent person to the office of city engineer and surveyor, who shall hold his said office for one year, and until his successor shall be appointed and qualified; and before entering upon the duties of his office, said city engineer and surveyor shall take an oath or affirmation to faithfully and impartially discharge the duties of his said office.

"Sec. 2. It shall be the duty of said city engineer and surveyor, when called upon by the city council, or any committee thereof, to make all surveys of the streets, lanes, alleys, sidewalks, and public roads in said city; and to execute plats, plans, draughts, and statements of the same, and to calculate and ascertain the proper and necessary grade and level of all of said streets, sidewalks, lanes, alleys, and public roads, and execute profiles, delineations, and

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draughts of the same. All of which surveys, grades, levels, profiles, delineations, and draughts, said city engineer and surveyor shall deliver over to the city clerk and recorder as soon as prepared, who shall carefully file away and preserve the same in his office. And said city engineer and surveyor shall, from time to time, discharge such other official duties as the city council, by ordinance or resolution, shall direct; for all which he shall receive such compensation as the city council shall determine."

Under this ordinance, the engineer is simply to draw plans, and hand them to the city clerk, to be filed away, and discharge 93] *such other duties as the council, by ordinance or resolution, may direct. He is not to build the bridge on his own plan; nor, if he draw a plan, is the council bound to adopt it. No act of his, of this class, has any validity till adopted by the council. By determining to go on with the bridge, they make the act their own. The ordinance says he is to "calculate grades," but that does not shield the city from responsibility for injuries resulting from cutting down or filling up streets, in conformity to such grades. The engineer is not an independent officer.

V. Even if he were an independent officer, the city would be liable. *New York v. Baily*, 3 Hill, before cited, is in point. The city of Dayton was not bound to build the kind of bridge which they did build. It was not one of the usual kind of canal bridges. It was an arched stone bridge—intended to be a work of great beauty and strength—to improve in value the individual and corporate property of the city, as well as to benefit the public. The council were in duty bound to have a plan drawn, filed away, examined, and adopted with care and prudence. If they did not do so, they are certainly liable; and if they did so, the engineer is not an independent officer, and the negligence was the *direct negligence* of the city.

VI. The city of Dayton is not to be shielded from liability as a "public officer." It is in no respect analogous to a public officer. It is not like the county commissioners. The latter are the agents of the county, as the city council is of the city; and the county and the city must respond in damages for acts which would make individuals liable. By the act of incorporation, the city is invested with certain rights. The people in that capacity may, and often do, take upon themselves and agree to discharge some of the duties which belong strictly to the state, that they may perform them in

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their own peculiar way. They discharge those duties as well for their own interest, emolument, and pleasure, as for the public good; and it is not supposed that, because they do so, they have the shield of the sovereignty. They are *not, on that account, less liable [94 for the consequences of their acts.

RANNEY, J. It is perfectly clear that the principle settled in *Rhodes v. Cleveland*, 10 Ohio, 159; *McComb v. Akron*, 15 Ohio, 474, and *Akron v. McComb*, 18 Ohio, 229, can have no application to the present controversy. In each of those cases, the liability of a municipal corporation, acting through subordinate agents, within the scope of its authority, and *without malice or negligence*, was enforced, where the acts of such agents resulted in injury to the property of private individuals. The propriety of investing such corporations with a power to improve their streets, resulting often in indirect injury to private property, is conceded; but the cases rest upon the clear principle of right and justice, which requires compensation to go hand in hand with public benefit. And, when in the lawful exercise of these powers, private property must be injured for the common benefit of all, all should be held liable to make reparation; and, in the view of the judges who concurred in these decisions, the principle was not without support from that section of the constitution of the state, which secures the inviolability of private property. I am aware that these cases have not commanded the universal assent of the profession, and, as one member of this court, I am quite willing to reinvestigate the doctrines upon which they are founded, when a case shall arise in which it can properly be done; but, notwithstanding their very emphatic condemnation by a highly respectable judge in a sister state (Bronson, C. J., in *Radcliff's Ex'rs v. Mayor*, etc., of Brooklyn, 4 Com. 204), I still think that the obligation to make compensation in such cases can not be seriously doubted; and the only question seems to be, whether it should not be uniformly provided by the legislature, as a matter of justice, when such improvements are authorized rather than afforded by action in the courts of law.

*In the present case, it is not doubted that the corporation, [95 under its authority to improve the streets of the city, had full power to build the bridge in question. The special verdict finds that the bridge was built by contract with the city council, upon a plan furnished by the city engineer; and that its fall, which

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occasioned the injury to the plaintiff, was owing to a defect in the plan, arising from the carelessness and unskillfulness of the engineer.

The engineer was an officer of the city, elected by the people, and, among other things, charged with the duty of furnishing plans and specifications of this character. He acted in subordination to, and under the direction of, the city council, although the charter and ordinances of the corporation defined the duties he was required to perform. This action is grounded, therefore, upon the *negligence and unskillfulness* of the agent and officer of the corporation, resulting in injury to the plaintiff; and not, as in the cases referred to, upon any claim of liability for injuries arising from his lawful acts, while executing the orders of the council, and performed without malice or negligence. And the true question is, does the corporation that elects him, directs what works he shall undertake, and for whose benefit he acts, become responsible for the fidelity of his conduct, and liable to individuals for injuries arising from his negligence and want of skill, while executing the lawful command of his employers? We have no doubt that it does; and we know not by what court, or in what case, for many years past, it has ever been questioned.

The liability of a private person, under precisely such circumstances, rests upon one of the oldest and best settled doctrines of the common law. We have again and again affirmed, that the liabilities of corporations, private and municipal, are no less extensive; and that the maxim, *respondeat superior*, properly applies to them, in the same manner, and to the same extent, as in its application to the liabilities of private individuals. *Kerwhacker v. Cincinnati, Columbus and Cleveland Railroad Co.*, 3 Ohio St. 172; 96] **Keary v. The Same*, Ib. 201. However lawful a business may be, and whether pursued by an individual or corporation, the law exacts of those who undertake it, a careful regard for the rights and interests of others. It must not only be lawful in itself, but also lawfully pursued, to shield from responsibility. It can not be accomplished safely to others, without the exercise of a proper degree of care and skill; which simply means, such care and skill as careful and prudent men, competent to the undertaking, exercise in their own affairs, when the loss, if any happens, is to be borne by themselves. The reasons upon which this doctrine rests, are not in the least diminished, when applied to injuries inflicted

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by associations of men, endowed with corporate capacities, either for individual emolument or social convenience. They are still but individuals, pursuing their own interests, or common advantage; and it would be altogether inadmissible to permit them to use their acts of incorporation, granted at their own instance, and designed to afford them extraordinary facilities in the accomplishment of these purposes, to deprive others of acknowledged rights. Whether men act individually or collectively, or whether they pursue mere private gain, or social convenience, or governmental security, they are equally bound by the great law of social duty, to so conduct themselves as not to injure others by their malice or negligence; and when they do, the highest considerations of right and justice require them to be held responsible, whoever may be injured, or by whomsoever it may be inflicted. Even the state is not absolved from the moral obligation of making reparation in such cases; and it is only because her policy requires an appeal to her justice, rather than amenability in her courts, that a remedy is denied.

To a certain extent these doctrines are not controverted by the plaintiff's counsel, and in a limited sense he concedes the liability of municipal corporations for the negligent or unskillful conduct of their agents and servants; but he insists that the building of bridges is, from its nature, the exercise of a power, public and *political, devolved upon the city as a public officer of the [97 state, and not a mere corporate power, and that the city engineer is a public ministerial officer of the municipality, and not a mere private servant or employe thereof, for whose conduct it can be made responsible.

We are wholly unable to see how the building of a bridge, when necessary as a part of the street of a city, is to be distinguished in principle from the performance of any part of the work that may be needed to accomplish the same purpose upon the land; or how the mode of appointing an officer, or the rank he may hold, or the particular work he may be intrusted to accomplish, can be of any importance in determining the liability of the corporation. The true inquiry in every case must be, does he act for the corporation, and under the command of its regularly constituted organs, and while acting in such capacity, has he injured the party complaining, by his negligence or unskillfulness? If this question is answered in the affirmative, the relation of principal and agent exists, and the

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liability of the former to respond for the defaults of the latter is established. How far this obligation extends, and in what cases it properly arises, is made very manifest in several late cases. To say nothing of the early reported cases, in this state, and the large number determined upon the circuit, it may be sufficient to refer to a series of decisions in the State of New York, in which the subject has been fully and ably examined.

The case of *Baily v. The Mayor, etc., of the City of New York*, 3 Hill, 531, was brought to recover for an injury sustained by the plaintiff from the breaking away of a dam on the Croton river, erected for the purpose of supplying the city with water. The work was done by contractors, under the superintendence and control of water commissioners, appointed by the governor of the state, with the advice and consent of the senate; and it appeared that the injury arose from their want of skill and care in constructing the 98] dam. On the part of the city, it was *contended that the construction of the work was a power conferred upon the corporation for an exclusively public purpose, in the performance of which they were obliged to employ the commissioners appointed by the state, without the ability to discharge them, and substitute others in their places, and therefore that they could not be deemed the agents of the corporation. But the court were of a different opinion, and gave judgment for the plaintiff. It was admitted that a public officer, although liable for his own negligence or malfeasance in the discharge of his duties, was not so liable for the misconduct of those he was obliged to employ, the rule of *respondeat superior* not applying in such cases. But it was held, that the power conferred upon the corporation had for its principal object the private advantage of the inhabitants of the city, although incidentally benefiting the public at large; and inasmuch as the corporation might have accepted or rejected the amendment to its charter, it must be held to have accepted it upon the condition that the agents should be appointed by the state, and from that time forth they became the agents of the corporation, and fixed the liability of the corporation for their negligent and unskillful acts while in the discharge of their duty. The case was taken to the court for the correction of errors, where the judgment of the Supreme Court was affirmed. 2 Denio, 433.

In the case of the *Rochester White Lead Co. v. The City of Rochester*, 3 Com. 463, the property of the plaintiffs had been injured in consequence of the unskillful construction of a culvert,

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built under the superintendence of the city surveyor. The plaintiffs were allowed to recover, and in answer to the objection that the work was of a public character, in the performance of which the corporation could not be held responsible, in a private action, for the misconduct of its officers, the court proceed to draw the distinction between the acts of a corporation, judicial in their nature, and such as are merely ministerial, holding an ordinance of the corporation, directing the construction of a work *within the scope of [99 its powers, to be judicial, for which it can not be made responsible; but that the prosecution of a work thus authorized was merely ministerial, and that the corporation was bound to see it done in a safe and skillful manner.

The same distinction was taken in the case of *Lloyd v. The Mayor, etc., of New York*, 1 Seld. 369; in which the plaintiff recovered for the value of a horse, whose death was occasioned by the negligence of an officer of the city, in leaving open a public sewer, during the night, while undergoing repairs. The court say: "The act which caused the injury in the present case, was performed under the power and duty to clear the sewers of the city. Legislation, or, in other words, the establishing of rules and regulations in respect to cleaning the sewers, or keeping them in a state of cleanliness, is *one* thing, and the *act* of cleaning them is *another*. The power and duty to perform the latter is clearly ministerial, and falls under the class of private powers. The principle of *respondet superior* consequently applies, and the judgment must be affirmed."

These cases sufficiently indicate the true line that divides the exercise of public, or merely judicial or legislative powers, conferred upon a corporation, from those ministerial or executive, and municipal in their nature and character.

In the exercise of the first class, the corporation can not be made responsible for the misconduct of those intrusted with their execution. It embraces all that description of duties, involving judgment and discretion in their exercise, and resulting in prescribing the rules by which the conduct of individuals is to be regulated, or works, either public or municipal, are to be accomplished. And the immunity from responsibility to individuals is grounded upon the same public policy, that protects the judge or legislator in the exercise of his duties, and is designed to remove every obstruction to the free exercise of his judgment and discretion. It also includes, so far as the liability of the corporation is concerned, the accom-

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100] plishment of purposes merely public, *devolved upon the corporation as a public officer or agent of the state, with no power to decline their performance. In such cases, the immunity of the state is transferred to its officer or agent, and he only is liable for his own direct misconduct. The power of prescribing rules and regulations is sometimes called judicial and sometimes legislative. It would perhaps be more accurate to say that it partakes of the nature of those powers, and therefore is attended with the same protection to those who exercise it; since it is perfectly clear that the legislature is incompetent to devolve any portion of its legislative power upon a corporation, or take from the judicial tribunals any part of the judicial power of the state, where the constitution has lodged it. *C. W. & Z. R. R. Co. v. Clinton County*, 1 Ohio St. 77. In such cases, the corporation exercises a wholly subordinate function, and rather gives detailed application to legislation, than originates new rules; while its by-laws are to be deemed in the nature of compacts between the corporators, rather than acts of legislation.

But when a municipal corporation undertakes to execute its own prescribed regulations, by constructing improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual, and as such owing all the duties to private persons, and subject to all the liabilities that pertain to private corporations or individual citizens. To this class most clearly belongs the construction, repair, and maintenance of its streets. Nor does this conclusion give the least countenance to the supposition, that the corporation is liable for the misconduct of the officers it selects, when performing duties for or between private individuals. In such cases, the whole duty of the corporation is performed when the selection is made, and having no interest in, or control over, the performance of such services, no liability attaches.

No valid objection can be taken to the rule of damages adopted in this case. It is very true that the damages to be recovered against the corporation, must be the immediate, natural, and
101] *necessary result of the negligence or want of skill complained of. But the drawing off the water for the purpose of removing the materials, of which the bridge was composed, out of the canal, was as clearly the necessary result of its fall, as its obstruction of the water while in.

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Finding no error in the ruling of the court below, the judgment must be affirmed.

DAVID S. DUTRO v. MATTHEW WILSON, JR.

The word "owner," in section 1 of the mechanics' lien law, is not limited in its meaning to an owner of the fee, but includes, also, an owner of a leasehold estate. If the ownership is in fee, the lien is upon the fee; if it is a less estate, the lien is upon such smaller estate.

The true rule of damages in an action on the case, brought by a reversioner on account of an injury done to the premises, is the amount of the injury done to the estate in reversion.

ERROR to the district court of Muskingum county.

The case is sufficiently shown by the following extracts from the record :

Declaration.

"The State of Ohio, Muskingum county, ss.

"Court of common pleas of Muskingum county, of the term of March, A. D. 1852.

"Mathew Wilson, Jr., by his attorneys, complains of David Dutro, in a plea of trespass upon the case; for that, whereas, the Hope Hose Company, No. 1, before and at the time of the committing of the grievances hereinafter mentioned, had and enjoyed a certain lot or parcel of land, with the appurtenances, situate in the city of Zanesville, in the county aforesaid, as tenant thereof *to the said plaintiff, that is to say, as tenant thereof for one [102 year, from the 1st day of September, 1851, with the privilege of continuing said tenancy for two years more, that is to say, for three years from the commencement thereof, to wit, at the county aforesaid. Yet the said defendants contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, in his said reversionary interest and estate, in and of the said lot or parcel of land, and the appurtenances thereto belonging, while the same were so in the possession of the said Hope Hose Company, No. 1, as tenant thereof, as aforesaid, to the plaintiff, to wit, on the 6th day of March, A. D. 1852, at the county aforesaid, wrongfully and unjustly entered upon said lot or parcel of land, and then and

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there removed therefrom a certain frame building, then situate thereon, of great value, to wit, of the value of one thousand dollars, whereby the plaintiff hath been, and still is, greatly damaged in his said reversionary interest, to wit, at the county aforesaid."

There were two other counts in the declaration, but it is unnecessary to notice them.

Pleas.—"And now comes the said David Dutro, by Goddard & Eastman, his attorneys, and defends the wrong and injury, when, etc., and as to the first count of the plaintiff's declaration, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, the said defendant, because he says that the said Hope Hose Company, after the commencement of their said lease from the plaintiff, and before the expiration thereof, to wit, on the 1st day of October, 1851, at Zanesville, in the county aforesaid, undertook to erect a frame building upon the said land; and in furtherance thereof, then and there contracted and agreed with one Erastus Bailey, that he, the said Erastus, should put a roof upon said building, and paint and glaze the same, for a reasonable compensation, to be paid him by said company; and the defendant avers that the said Hope Hose Company did then and
103] *there proceed to erect said building upon said demised premises, and that said Bailey, in pursuance of said contract, did then and there proceed to put a roof on said building, and to paint and glaze said building, and that he reasonably deserved to have therefor a large sum of money, to wit, the sum of fifty dollars; and the defendant further avers, that the said Bailey afterward, and within the period of four months from the time of his performing the said labor, in roofing, painting, and glazing the said building, to wit, on the 11th day of November, 1851, at said Zanesville, made an account in writing of the items of such labor, as follows, to wit:

ZANESVILLE HOSE COMPANY,

To ERASTUS BAILEY, Dr.

October 17, 1851.

To roofing hose-house, 7 squares and 20 feet—\$5 per square.	\$36 00
To priming front of house and windows and doors.....	4 00
To priming and glazing 45 lights of glass.....	3 15
	<hr/>
	\$43 15

And on the day and year last aforesaid, at said Zanesville, made

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oath thereto; and on the same day filed the said account, with the oath aforesaid, in the recorder's office of said county of Muskingum, when the same was, by said recorder, recorded in a separate book, provided by him for the recording of liens, in book A, page 86, on the same 11th November, to wit, at Zanesville aforesaid. And the defendant further in fact saith, that the said Erastus Bailey having such lien as aforesaid, afterward, and within the period of four months from the time of performing such labor, to wit, on the 5th day of January, 1852, at said Zanesville, commenced a suit before Frederick A. Seborn, Esq., a justice of the peace for said Zanesville, against said Hope Hose Company, and for the amount of the said account; and such proceedings were thereupon had that afterward, to wit, on the 13th day of January, 1852, at said Zanesville, by the consideration of the said Frederick A. Seborn, Esq., the said Bailey recovered judgment in the same action, and upon the same account, against said *company, for forty-three dollars and fifteen [104 cents damages, and eighty-nine cents, costs of suit. And the defendant further saith, that the said Bailey, afterward, to wit, on the 13th day of January, 1852, caused an execution to be issued upon said judgment, directed to any constable of the said city of Zanesville, and commanding him of the goods and chattels of said Hope Hose Company he cause to be made the damages and costs aforesaid, and costs that might accrue; which writ afterward, to wit, on the 14th day of January, 1852, at said Zanesville, came into the hands of Benjamin Spangler, a constable for said Zanesville, who, in pursuance thereof, afterward, on said 14th January, at said Zanesville, levied the same upon the said Hope Hose [building], being the same frame building mentioned in the first count of the plaintiff's declaration, and the same on which the said Bailey had his said lien, and advertised the same for sale, and afterward, to wit, on the 26th day of said January, at said Zanesville, sold the same to this defendant for the sum of two hundred dollars, as by the return on said execution, with the said justice remaining, fully appears. And the defendant afterward, to wit, on the 6th day of March, 1852, entered upon said lot and removed the said building, doing no injury to the plaintiff, as he lawfully might; all which he is ready to verify. Wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

“And as to the second and third counts of the plaintiff's declara-

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tion, the defendant saith he is not guilty in manner and form as therein alleged, and of this he puts himself upon the country, etc."

Replication.—"And the said plaintiff, as to the said plea of the said defendant, firstly above pleaded, says, that by reason of anything therein pleaded by the said defendant, in that respect, he ought not to be barred from his aforesaid action thereof against him, because, he says, that at the time of the making and execution 105] of *the said lease, in the first count of his said declaration mentioned, there was a building on the said lot or parcel of land, in said count mentioned; that by the terms of said lease, the said Hope Hose Company was to have said building to use as they might see proper, they agreeing to leave on said described tract of land a good, substantial frame building, when they delivered the same up to the said plaintiff, with all the improvements they might put thereon, to be delivered up with the said lot or parcel of ground to the said plaintiff; and the said plaintiff, in fact, says that the said Hope Hose Company did remove from said parcel of land the building aforesaid, then standing thereon, and erected in its stead the said frame building described in the said plea of the said defendant, by him firstly above pleaded as aforesaid; and this the said plaintiff is ready to verify. Whereof he prays judgment, etc."

Rejoinder.—And now comes the said David, by Goddard & Eastman, his attorneys, and saith that the plaintiff ought not, by reason of anything in said replication alleged, to have or maintain his aforesaid action thereof against him, because he says that the said supposed lease in said replication referred to, was in the words and figures following, that is to say:

"This is to certify that I, Matthew Wilson, Jr., have rented unto the Hope Hose Company, No. 1, of Zanesville, Ohio, a certain lot of ground on Sixth street, on the rear of Beaumont & Hollingsworth's store, for the term of one year from the first day of September, at fifty dollars per year, to be paid quarterly, the said Hope Hose Company to have the privilege of holding it for three years at the same price per year. The said hose company is to have the building that is at this time on the premises to use as they may see proper, they agreeing to leave a building on the premises, a good 106] substantial frame, when they deliver up *the said premises

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to M. Wilson, Jr., and all improvements that may be put on to be delivered up with the lot.

(Signed.)

"On part of Hope Hose Co.

"MATTHEW WILSON, JR.

{ D. H. ORNDORFF,

{ WM. H. STEPHENS.

" ZANESVILLE, September 1, 1851.

"And no other or different; and the plaintiff avers that the building described in said paper as then on the said premises was at the date thereof, to wit, on the said 1st September, 1851, at said Zanesville, of no value whatsoever. And this the defendant is ready to verify, wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action thereof against him, etc."

Demurrer to Rejoinder.—"And now comes the said plaintiff, by his attorneys, and says that the rejoinder of the said defendant to the replication of said plaintiff, and the matters and things therein contained, and set forth, are not sufficient in law, to bar the said plaintiff from having and maintaining his aforesaid action thereof against him, the said defendant, and that he, the said plaintiff, is not bound by law to answer the same. And this he is ready to verify; wherefore he prays judgment and his damages aforesaid."

There was judgment for the plaintiff below upon the demurrer, and upon the assessment of damages, a bill of exceptions was taken to the rulings of the court, of which a copy is now here given:

"Be it remembered that upon the inquiry of damages which was made by the court, neither party requiring a jury, the plaintiff proved the value of the building removed by the defendant to be the sum of \$229.32. The defendant then offered to prove that the said building, for the removal of which this suit was brought, was sold upon an execution as set forth in the defendant's plea, and also offered to prove the other facts set forth in said plea as to [107 said Bailey's account, and his lien on said building for the same, and also offered to prove that the money arising from such sale was applied first to the payment of said Bailey's judgment, and the residue to the payment of accounts of other mechanics who had performed labor on said building, and who had taken the steps required by the statute, to assert and continue such liens, and claimed that the judgment for the plaintiff should be for nominal damages only. This evidence the court refused to receive, and decided that the true rule of the plaintiff's damages was the value of the building, to which decisions of the court the defendant, by his counsel, excepta,

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and prays the court to sign and seal this, his bill of exceptions, and that the same be made a part of the record, which is accordingly done."

Goddard & Eastman, for plaintiff in error.

Jewett & O'Neal, for defendant.

Goddard & Eastman, for plaintiff in error :

I. The builders had a lien upon the property in question, and no interest in the house was acquired by the owner of the lot, whether owner of the term for years or owner of the reversion, until they were paid.

II. The Hope Hose Company were, in the sense of the statute, the owners of the lot. The statute does not say owners in fee, nor owners of a term of ninety-nine years, but simply owners. *Choteau v. Thompson & Campbell*, 2 Ohio St. 114. This sale, it is true, was not a sale of the leasehold interest of the company. It was a sale of a building which stood on it. The hose company do not complain that a part of their interest has been sold, and not the whole, nor can the reversioner.

III. But the first section of the lien law gives a lien upon the building, independent of the lot upon which it stands. A true paraphrase would run thus: "Any person who shall perform labor 108] on any building, by virtue of a contract with the *owner of the building, shall have a lien upon the building, and also upon the lot on which the building stands, to the extent of the interest which the owner has in the lot." Suppose the mechanics had agreed with these lessees to build for them, the builders to retain a lien on the building for their unpaid bills, to be enforced by sale and removal of the building during the term of the lease, could the lessee have prevented the enforcement of such a lien? The statute (enacted before this lease was made) takes the place of such a contract.

IV. The tenth section of the act has no application. There was no equitable title requiring that section to be observed. The title of the hose company, under the lease in question—good under our statutes for three years—was the legal title.

V. The case of *Thornton v. Williams*, 14 Pick. 49, has no application. In that case, Smith had an equity only, and no right of possession, though probably he had actual possession. He was not the proprietor of the land, and none but such proprietor could, under

the Massachusetts law, subject the building to lien. Our statute gives the lien upon the building *and* the land.

VI. Wilson had no *lien* on the improvements which should be made on the lot. The lessees were bound to deliver up the improvements when the lease should expire. This gave him no *lien*; but, if it did, such *lien* could not attach till the improvements were discharged from the mechanic's *lien*.

VII. But, in any view, what damages ought Wilson to have, if he recover at all? This suit is brought a very few months after the commencement of the lease. *Non constat*, but that at the expiration of the lease the lessees would have a substantial frame house, and deliver it up to the lessor. At most, he could only recover for the technical injury to the land, and in such case the damages would be nominal only.

Jewett & O'Neal, for defendant in error:

I. The condition of this property was not such as to authorize *the mechanics' *lien*. The *lien* given by the first section of [109 the law is upon the building, "*and upon the lot of land upon which the same shall stand*;" but to enable the mechanic to take advantage of this provision of the law, the labor performed and the materials furnished must be "*by virtue of a contract or agreement with the owner thereof*."

By the terms of the lease the house removed was to be replaced by another one, and all other improvements put upon the lot were to remain there for the benefit of Wilson. They became his property in law and in fact. He became the owner, and he would have been entitled to his remedy against the lessees, if they, during the existence of their lease, had attempted to remove that or any other building erected on the lot. Having removed the building that was upon it at the time they took possession, their power to remove was exhausted. All other buildings erected thereafter, attached to the freehold, and by operation of law, as well as by the provisions of the lease, vested in Wilson the lessor and the owner of the lot.

II. Whether or not a mechanic can assert a *lien* upon a building, not a fixture, is a question which does not necessarily arise in this case. It is not claimed that the building in controversy in this case was not a fixture; nor is it denied that the ownership of the lot was in Wilson. But if we understand the claim of the

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plaintiff in error, it is, that the first section of the law under discussion, is susceptible of a division; that the lien may attach to the *building, the fixture, the appurtenance to the land, without attaching to the land itself*; and that if the owner of the building is a different person from the owner of the land, then the building may be sold and removed from the land. No foundation for any such claim can be found in the statute. The very provision which authorizes this lien, and the only provision, is in the first section of the act; and by its terms whenever the lien attaches to the building, it must attach to the land upon which the building is erected.

110] *III. The section referred to is the only section of the law that gives to the mechanic a lien for the labor and materials furnished. The law does not embrace all mechanics, nor extend to all kinds of labor. The engine and car builders can not secure liens for the labor and materials by them furnished, in carrying on their business; and the same remark is equally true in regard to almost every other class of mechanics, except those whose business is indicated by the law in the character of the structures named in the first section of it.

There was reason for authorizing a lien upon a water-craft, which on the day of its completion might be floated beyond the jurisdiction of our courts and into another state. But the legislature saw no necessity for embarrassing the ordinary business of the country, with these special liens, upon structures of a movable character, and in which our mechanical interests are more deeply involved, perhaps, than in any other species of property.

A tenement, not a fixture, is no more permanent than a carriage. It may change owners daily. It may be moved from place to place to suit the convenience of its last owner. If it be subject to this lien, then two years, for instance, after its construction, the owner of it at that time, the man who has paid for it and purchased it without notice, because he has no means of obtaining any, for it has no name and no locality, may be called on to pay the mechanic the full amount of what it originally cost.

IV. The Massachusetts statute in relation to mechanics' liens is similar to our own, and in support of our views we refer to the case of *Thaxter v. Williams et al.*, 14 Pick. 49.

V. Upon the general question of our right to recover and the rule of damages, we refer to 4 Kent's Com. 355; 11 Mass. 518; 8 Pick. 235; 19 Ib. 156; 16 Ib. 464.

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THURMAN, C. J. By the terms of the lease all the improvements that the lessee should put on the premises, were to be delivered up with the lot to the lessor, at the expiration of the lease. [11] The building in question was erected by the lessee, and was a fixture. The interests of the parties then were, a leasehold estate in the hose company, and a reversion in fee in Wilson, the lessor. The lien of the mechanic who erected the building for the company, was upon the leasehold estate, and no more. This point was decided in *Choteau v. Thompson*, 2 Ohio St. 123, where it is said: "The word 'owner,' in the first section of the act, is not limited in its meaning to an owner of the fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is upon the fee, if it is of a less estate, the lien is upon such smaller estate."

It follows that Dutro acquired by his purchase no greater estate than that of which the hose company was seized, and as they had no right to remove the building, he acquired no such right. The demurrer was therefore properly sustained.

For the same reason the testimony offered by Dutro, on the inquiry of damages, was properly ruled out, and the rule of damages claimed by him properly rejected.

The language of the bill of exceptions is not very clear in respect to the rule of damages adopted by the court, but we infer that by the expression, "the value of the building," is meant its value to the lessor; that is, the value of his reversionary interest in it. In other words, a not very happy phraseology is employed to express the true rule of damages, which was the amount of injury done to the reversionary estate in the lot by the removal of the building. We are strengthened in this inference by the fact that the only exception taken to the assessment is, that no deduction was made of the amounts for which the mechanics had held liens.

Judgment affirmed.

112] *THE LESSEE OF J. J. COOMBS AND T. EWING, JR. v. JOHN LANE.

In respect to official acts, the law will presume all to have been rightfully done, unless the circumstances of the case overturn this presumption; and, consequently, acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter.

Facts presumed are as effectually established as facts proved, so long as the presumption remains unrebutted.

An entry, made by the registrar of a land office, in the "tract-book," that certain tracts are "school lands," is *prima facie* evidence that they were duly selected and approved as such.

Where such an entry did not show *for what township* the tracts had been selected, but they had been taken possession of, and held, as its school lands, for over sixteen years, by the township in which they lie, and no claim had been made to them during all that period, either by the government or by any other township, or by any individual, and no other school lands had been selected for said township, and there was no evidence that any other township was without school lands: *Held*, that it should be presumed that the lands had been selected for said township in which they lie.

It may be that, under the acts of Congress of April 30, 1802, and March 3, 1803 (2 Stat. at Large, 173, 225; 1 Chase, 72-74), it was not necessary that a survey, even into townships, should have been made, in order that the title to section 16 should vest in the state.

But it is not clear that it was designed, by these acts, to appropriate section 16, specifically within the bounds of the "donation tract," for school purposes. It seems most likely that that tract was considered as falling within the denomination of lands "granted or disposed of," referred to in the act of 1802; and that, therefore, not section 16, but, in the language of the act, "other lands equivalent thereto," were intended as the school lands of this tract.

The "donation tract" was not required to be divided into sections by the act of Congress of May 10, 1800. 2 Stat. at Large, 73. That act required such lands *only* to be surveyed or subdivided, as the previous act of May 18, 1796 (1 Stat. at Large, 464), directed to be sold. But no part of the "donation tract" was ordered to be sold by this latter act. Besides, there are provisions in the act of 1800 that forbid its application to the "donation tract."

113] *There was ample authority, under the acts of Congress of 1803 aforesaid, and 1816 (3 Stat. at Large, 409), to select school lands for the "donation tract."

Under the provisions of the acts aforesaid, of 1802 and 1803, every township, *fractional or entire*, containing a section 16, was entitled to it for school purposes, if undisposed of; if disposed of, then to its equivalent.

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THIS was a motion for a new trial, reserved by the district court in Morgan county.

The lands in controversy are lots Nos. 7 and 8, in the ungranted portion of the donation or 100,000-acre tract, in the Marietta district, and lying in township 9, range 11, in Morgan county, Ohio.

The following acts of Congress show the origin and history of said donation tract:

Section 3 of the act of April 21, 1792, "authorizing the grant and conveyance of certain lands to the Ohio Company of Associates," authorizes and empowers the President of the United States to grant and convey to Rufus Putnam, Manasseh Cutler, Robert Oliver, and Griffin Green (agents and trustees of the Ohio Company), in fee simple, in trust for uses therein expressed, "a further quantity of *one hundred thousand acres* of land: Provided always, nevertheless, that the said grant of one hundred thousand acres shall be made on the express condition of becoming void, for such part thereof as the said company shall not have, within five years from the passing of this act, conveyed in fee simple, as a bounty, and free of expense, in tracts of one hundred acres to each male person, not less than eighteen years of age, being an actual settler at the time of such conveyance." 1 Little & Brown's Statutes at Large, 258.

[A large portion of this 100,000-acre, or donation tract, not having been conveyed to actual settlers, reverted to the United States at the end of said five years.]

On the 18th of March, 1818, Congress passed an act providing, among other things, for the sale of said ungranted lands in the donation tract.

*The first section of this act provides, "That for the purpose [114 of ascertaining the quantity and providing for the sale of the lands belonging to the United States within the limits of said tract of 100,000 acres," etc., "it shall be the duty of the surveyor-general, and he is hereby authorized, to require of the said Rufus Putnam, and other surviving patentees in trust as aforesaid, to make a report to him of the quantity and situation of the lands by them conveyed, as bounties, to actual settlers, according to the condition of said third section and grant aforesaid; and also a duly attested copy of the field-notes and plat of the surveys of the lands by them conveyed to actual settlers as aforesaid. And the surveyor-general, on receiving a satisfactory report of the quantity and situation of the lands so conveyed, shall cause the residue of the lands

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within the said tract to be surveyed in the same manner as the other public lands; or, if he shall deem it more convenient, into tracts of one hundred acres, conforming, as far as practicable, to the plan on which lots granted to actual settlers were laid off; and he shall make return of the surveys to the general land office, and the register of the land office at Marietta."

The third section of the act provides, "That such part of the tract described by the first section of this act as shall appear to belong to the United States, shall be offered for sale at Marietta," *"with the exception of the usual proportion for the support of schools;"* the sales to be under the direction of the register and receiver of the Marietta district, and "on such days respectively as shall, by the proclamation of the President, be designated for that purpose," etc. See 3 L. & B.'s Statutes at Large, 409.

[The plat of the donation tract made pursuant to this act shows three large tracts, marked A, B, and C, of lands belonging to the United States, in consequence of not having been conveyed to actual settlers by Putnam and others. Tract C lies in township 9, range 11, Morgan county, and the lots in controversy are in the south end of said tract C.]

115] *On the trial before the court (to which the cause was submitted by consent of parties, without the intervention of a jury), the plaintiff gave in evidence a certified copy of a patent from the United States to Samuel A. H. Marks, dated July 1, 1851, for lots Nos. 7 and 8 in the donation tract, Marietta, Ohio, district, township 9, range 11, of lands subject to sale at Chillicothe—200 acres. The patent recites the location of warrant No. 1,328, for 160 acres, issued under act of September 28, 1850, to Samuel A. H. Marks, sergeant United States marine corps, Florida war. Excess paid for, as per receipt No. 17,490.

Also, deeds regularly executed, acknowledged, and recorded, from the said Marks to the lessors of the plaintiff; and it being admitted that the defendant was in possession of the land sought to be recovered, the plaintiff rested his case.

The defendant then gave in evidence an exemplification from the records and files of the general land office, of certain papers sent by the commissioner of the general land office to the clerk of the court in Morgan county, at the instance of one of the lessors of the plaintiff, for the use of either party to the suit, dated August 9, 1852. The papers contain:

1. The proclamation of the President of the United States, for sales at Marietta of the lands belonging to the United States, in said donation tract, pursuant to said act of March 18, 1818, and for sales at Vincennes of certain lands also mentioned in said act, with a memorandum in red ink, at the foot: "*No sales at Vincennes. See proclamation of the 19th of April, 1821, No. 45.*"

2. A certified copy of a plat of the ungranted lands in the donation tract of 100,000 acres lying in township 9, range 11, surveyed by Joseph Francis, 1818. There is nothing in this plat indicating lots 7 and 8 to be school lands. It is surveyed into 100-acre lots—no section lines marked.

3. A description of the lands surveyed, with the field notes. Nothing about school lands here.

*4. Letter from the treasury department to Joseph Wood, [116 register, Marietta, dated July 13, 1805.

[This is a letter communicating certain selections by the secretary of the treasury, of school lands in lieu of section 16, for certain townships in which section 16 had been sold or disposed of, made pursuant to section 7 of the act of May 20, 1802, and section 3 of the act of March 3, 1803. See 2 L. & B.'s Statutes, 175, 226. So much of this document as has any relation to the donation tract is here copied.]

"TREASURY DEPARTMENT, July 13, 1805.

"SIR:—I wrote you on the 11th instant, on the subject of the selection of certain reserved sections in lieu of such sections No. 16 as might have been sold, granted, or disposed of.

"There are within the limits of the Ohio Company Purchase two tracts, sold or granted to the said company, in which no reservations or appropriations were made by Congress, and in which, therefore, section No. 16 has been sold or granted. For a clearer elucidation of that point, I refer you to the plat some time since transmitted, and to the inclosed copy of a communication made on the same subject by me, during the last session of Congress, to Mr. Tallmadge, chairman of a committee of the house of representatives. To these I will add, that by an inspection of the plat, it seems that, in the 100,000-acre or donation tract, there were only four entire and four fractional sections No. 16; one of

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which last, being included in the tract C, was not ceded by the Ohio company, and remains undisposed of.

"In lieu of the seven sections, or fractional sections No. 16 contained in the said tract of 100,000 acres, I have selected the following, viz :

117] *TO REPLACE—					SELECT—				
Section 16,	township 3,	range 8,			Section 8,	township 3,	range 8.		
" 16,	" 3,	" 9,			" 8,	" 3,	" 9.		
" 16,	" 4,	" 10,			" 8,	" 4,	" 10.		
" 16,	" 8,	" 11,			" 8,	" 8,	" 11.		
Fract. 16,	" 4,	" 8,			{ An equal quantity of the tract A, lying in township 4, range 8, within the said donation tract, and to be laid on the north end of the same. An equal quantity of tract C, lying in township 9, range 11, within the said donation tract, and to be laid on the south end of the same.				
" 16,	" 4,	" 9,							
" 16,	" 5,	" 10,							

[Here follows a list of similar selections for eleven other townships, none of which, however, are in the donation tract, and township 9, range 11, is not one of the number. Said document will be found at length in the printed volume relating to public lands, which is made evidence in the case.]

5. Copy of plat of part of Marietta district, showing tracts A and C within the 100,000-acre tract referred to in the above letter of July 13, 1805. This plat indicates the ranges, townships, and sections of the lands bounding the donation tract on the south and west. It also indicates, by a X, the places where section 16 would fall if the surveys of the adjoining lands were carried through.

6. Letter from the commissioner of the general land office to Wyllis Silliman, register, Zanesville, dated November 18, 1819. This acknowledges the receipt of a letter from Mr. Silliman of the 8th instant, and says: "The secretary of the treasury has approved of the selection of the three unsold quarters of sections 21, 6, 10, and of the southwest quarter of section 15, same township and range, for the use of schools, in lieu of 16, 5, 10. You will, therefore, reserve them from sale." After the copy of the letter, is the following:

"The following are the entries made on the tract-book, showing the disposition made of land in township 6, range 10:

"On the page occupied by section 15—The southwest quarter of this section reserved for the use of schools by the secretary of the

treasury, on November 17, 1819, in lieu of 16, 5, 10. See section 21.

*"On the page occupied by section 21—The northeast, [118 southeast, and southwest quarters of this section reserved by the secretary of the treasury for the use of schools, in lieu of sections 16, 5, 10, on November 17, 1819. See southwest quarter of 15."

The defendant then further proved that he was in possession of the land in dispute at the time the same was entered by the said Marks, claiming to hold the same by a lease from the trustees of Windsor township, Morgan county, which was composed in part of fractional township 9, range 11, in the district of lands now subject to sale at Chillicothe, being formerly in the Marietta land district; and that he had been so in possession from the year 1834, claiming to hold the same as school lands belonging to said township 9, range 11, the trustees of which township took possession thereof, as also of lots 6, 9, 10, 34, and 59, in 1834, as school land, and rented it as such. He also proved that before and at the time of the entry by Marks he was in the actual cultivation of, and had an actual settlement upon, said land; and it was admitted that he had given no consent to the entry by said Marks at the land office.

By consent of parties, also, so much of the printed volume of instructions and opinions of the secretary of the treasury and commissioner of the general land office, printed by Gales & Seaton, in 1838, in pursuance of a resolution of the senate, dated February 28, 1837, was read in evidence, as was applicable to this case, in lieu of exemplified copies.

It was also admitted that township 9, range 11, was a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, and that no selection of school land had ever been made for said township, unless the land now in controversy was such.

It was also admitted that said lots 6, 7, 8, 9, 10, 34, and 59 constitute the south end of tract C, referred to in the secretary's letter of July 13, 1805.

The defendant then further gave in evidence a certificate of *Anthony Walke, register of the Chillicothe land office, dated [119 September 22, 1852, and which, it was admitted, was a true extract from the tract-book formerly kept in the land office at Marietta, of which office it was admitted that Joseph Wood was register, from 1803 to a date later than 1834.

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It was also proven in the case, that on the new tract-book made out in 1840, and used in the Chillicothe land district since that period, the said land was not designated as school land.

The certificate of the said Anthony Walke is as follows:

"REMNANT OF THE DONATION TRACT OF ONE HUNDRED THOUSAND ACRES.

	Section.	Township.	Range.	Quantity.		To whom sold.	Residence.	When sold.
				Acres.	100ths.			
Lot No. 1.	8	11	111	25		Samuel Camp.	Washington Co.	1836. March 14.
• Lot No. 6.	9	11	100	.....		School.....	.....	.....
• " " 7.	"	"	100	.....		" .....	.....	.....
• " " 8.	"	"	100	.....		" .....	.....	.....
• " " 9.	"	"	100	.....		" .....	.....	.....
• " " 10.	"	"	100	.....		" .....	.....	.....
• Lot No. 34.	"	"	76	.....		School.....	.....	.....
• Lot No. 59.	"	"	65	59		School land...	.....	.....

*Intervening entries omitted.

"The above appears to be in the handwriting of Joseph Wood, the late register of the Marietta land office; and I further certify, that I have not been able to find any plats of surveys of land for township 9 range 11, in this office, as should have been transferred from Marietta land office." (He also certifies that the words "school," and "do," "school land" are "in ink," and apparently the same handwriting as the other entries.)

The defendant further gave in evidence the deposition of said Anthony Walke, proving that he is, and has been since November 1, 1849, register of the Chillicothe land office.

120] *Also proving the location of the warrants, May 20, 1851, by Thomas Ewing, Jr., as attorney for the parties. Does not recollect that any evidence or affidavit was offered or filed, showing that there was no actual settlement or cultivation on the lots, nor did he suppose any necessary. Nor was any evidence produced, showing that the locations were made with the consent of the set-

tlers, "as the books themselves showed the lands were vacant, and subject to entry."

It was also admitted that the trustees of *township five, range ten*, never accepted or took possession of the land on the south end of tract C, selected by the secretary of the treasury as school lands for said township, on July 13, 1805, but that the trustees of said township did take possession of the southwest quarter of section 15, and the northeast, southeast, and southwest quarters of section 21, in township 6, range 10, selected on the 17th of November, 1819; which last-mentioned lands have been held and enjoyed as school lands for said township 5, range 10, ever since.

Upon the foregoing evidence the court found for the defendant; and thereupon the plaintiff moved for a new trial.

J. J. Coombs, for plaintiff:

I. In order to transfer the title from the United States, and vest it in the state, for the use of schools, there must be an *official act* performed by the secretary of the treasury. 4 Lit. & Brown Stat. 179; 2 Ib. 226. If this official act has never been performed by that officer, then it is clear that no title has ever vested. He can only perform such act by *matter of record* in his department; not necessarily by a strictly formal and technical record, but by means of some *authentic public writing* in the treasury department. 1 Greenl. Ev., sec. 483. Congress has, by numerous acts, recognized the doctrine that the governmental departments are *offices of record*, and has expressly given to their records all the dignity, as evidence, of the most solemn judicial records. Section 4 of the act of April 25, 1812, "for the establishment of a general land office in [121 the department of the treasury," and section 5 of the same act, 2 L. & B. 717; act of January 3, 1823, as to authentication of copies, 3 Ib. 721. Any attempt by a public officer to convey title to land by virtue of his office, without some act in writing, would be void under the statute of frauds. *Remington v. Linthicum*, 14 Pet. 84.

II. It may be safely admitted that the secretary of the treasury could have performed this official act, through the instrumentality of the commissioner of the general land office, while that office was in his department and under his supervision. But whether directly by himself, or by a subordinate officer in his department, acting under his authority, it must necessarily be done by means of some

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record or authentic writing. And as no official paper ever originates in or emanates from the department or the general land office, of which there is not a recorded copy preserved, it follows that every official act of the secretary or commissioner is susceptible of proof by means of exemplified copies from the records and files of the department, unless the same have been destroyed.

III. If it be admitted that a record or authentic writing is necessary to give validity to an official act of the secretary of the treasury, it will hardly be denied that the act must be proved by the record or writing, or an exemplified copy, unless it be shown that the same has been destroyed. To show how easy it would be for the defendant to prove his case, if the lands had been selected as claimed, see the book relating to public lands, printed by Gales & Seaton in 1838, vol. 2, p. 395. *Doe v. Campbell et al.*, 17 Ohio, 280.

IV. But the defendant presents simply an obsolete tract-book, found among the books and papers transferred from Marietta to Chillicothe, in which the lots in question, with five other adjoining lots, are marked "school," "do," and "school land." Even in this tract-book there is nothing indicating that these lots are school lands for township nine, range eleven, in preference to any other township.

122] *V. Where a record has been lost, and is ancient, its existence and contents may sometimes be *presumed*; and whether ancient or recent, after proof of the loss, its contents may be proved, like other documents, by secondary evidence. 1 Greenl. Ev., sec. 509. But in this case the records and files which should contain the evidence of the secretary's acts, if he ever acted at all in the premises, have not been lost or destroyed; they are all in existence, and accessible to the defendant, and there is no room for any presumption as to what they do or do not contain. Are not plaintiff's counsel, therefore, justified in assuming (what they very well *know*), that said records and files not only do not contain any evidence showing that the lands in controversy were ever selected as school lands for township 9, range 11, but that they actually prove the negative, so far as a negative is susceptible of proof? The lists of selections made for the Marietta district, under the act of 1826, are all complete in the general land office, and neither said township 9, range 11, nor the lands in controversy, are in any way mentioned in any of them.

VI. The dictum in *Campbell v. Doe*, 13 How. 249, that the secretary may perform this act of selection "through the commissioner

of the general land office, who may well be presumed to act under his authority when the contrary does not appear," is, of course, based upon the fact that the said commissioner is (or was) the head of a bureau in the treasury department, having in special charge the execution of all laws relating to the public lands, under the immediate supervision of the secretary of the treasury himself. It is going a step further, to hold that the secretary may perform this act (which *he* is specially required to do) through the register of a district land office, not an officer in his department, and not presumed to act under his authority. It is, however, idle to discuss this, no evidence showing that even the register of the Marietta district ever selected these lands as school lands for said township 9, range 11. It is to be inferred from the entries in the old tract-book that the register at Marietta, at some *unknown time, was under the [123 impression that said lots had been selected as school lands for *some* township, but as to *what time, by whom, for what township, or under what act*, he supposed they had been so selected, he has left us no means of inferring.

VII. But if this presumption could be extended to the acts of the register of the district land office, it would still be liable to be rebutted. *Campbell v. Doe*, before cited. The fact that ever since the supposed selection the lands have stood upon the general land office books as subject to sale at private entry, until finally *sold* and *patented*, is in opposition to any presumption that the secretary had selected them himself, or authorized their selection, for school purposes.

VIII. The entries "school," "do," and "school lands," though in ink, only tend to prove the negative proposition, that the lands were not selected as claimed. If they had been so selected and appropriated, the register would, first, in his tract-book and on the township plat, have noted by *pencil-mark* the lands recommended to be reserved, and, when advised of the approval of such selections, he would have noted "in ink" the fact of the reservation, stating the object thus: In the tract-book—"Reserved for schools, under the act of 20th May, 1826, per letter from the commissioner of the general land office;" on the plat, "school lands." See sixth rule of circular, August 30, 1832.

IX. The supposed selection can not be *presumed*, because, when the act was passed appropriating section 16 for schools, and for many years afterward, the township in question had within its

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limits original section 16, vacant and undisposed of, and therefore was not entitled to any other school lands. That section 16 may exist for school purposes, although the section lines may never have been run in the township where it lies, is no new construction. It was given in regard to this very township, by the secretary of the treasury, as early as 1805, and an act passed in regard to this land 124] (the donation tract) as early as 1818, shows that such was the congressional construction. Letter of the secretary, dated July 13, 1805, and act of May 18, 1818, 3 L. & B. Stat. at Large, 709. The title of township 9, range 11, to original section 16 within its limits, for school purposes, is clear and indisputable, and therefore she can be entitled to no other school lands.

X. It can not be presumed that the secretary made the supposed selection under the act of May 2, 1826, because the quantity is greater by 161 acres and 59 hundredths than the law authorized him to select for that township, even if it be admitted that said township was entitled to have school lands selected under said act. Said lots, numbered 7, 8, 9, 10, 11, 34, and 59, marked "school," etc., as will be seen by the plat, all lie adjoining each other in a compact form, and contain 641 acres and 59 hundredths of an acre. It is admitted that said T. 9, R. 11, contains less than three-fourths of an entire township, and consequently, under said act of May 20, 1826, could only have three-fourths of a section, or 480 acres, selected and appropriated as school lands. A public officer will not be presumed to have done more than his duty, exceeding the power vested in him by law.

XI. The said letter of the secretary shows that the same lands (or substantially the same) embraced in the lots 7, etc., were once selected (in 1805) as school lands, not for *township nine, range eleven*, but for *township five, range ten*, which is Waterford township, in Washington county. But the evidence shows that the trustees of said township (Waterford) never accepted said selection, or took possession of the lands. The evidence further shows, that in November, 1819, the secretary selected other lands—the S. W. quar. of sec. 15, and the N. E., S. E., and S. W. quar. of sec. 21, in T. 6, R. 10 (an adjoining township)—as school lands for said T. 5, R. 10; which selection the trustees did accept, and which lands they have held and enjoyed for school purposes ever since. Both parties, therefore, have treated the selection made in 1805 as a nullity, and the

*title of the plaintiff can not be defeated by showing an out- [125 standing title.

XII. (1.) The *legal title* to the lands in the south end of tract C, never passed out of the United States, by virtue of the selection of 1805. Although a selection under the act of March 3, 1803 (compare with act of May 20, 1826), after an acceptance and occupation of the lands by the township authorities, will doubtless vest a perfect *equity* in the lands for school purposes, yet the *legal title* will be governed by general principles. And the general principle applicable to the case, as announced by the Supreme Court of the United States, is this: "With the exception of a few cases, nothing but a *patent* passes a perfect and consummate title. One class of cases to be excepted, is where an act of Congress grants land, as is sometimes the case, in words of present grant." *Wilcox v. Jackson*, 13 Pet. 516.

(2.) The selection of the secretary, under said act of March 3, 1803, is an inchoate proceeding, a new preliminary step toward the execution of the compact, until the other party to the compact in some way signifies acquiescence in the act, and may be rescinded by the secretary at any time before acceptance by the township authorities, especially with their consent. Even under the act of 1826, it has always been supposed that the secretary could withdraw and cancel a selection, and substitute a different one with the consent of the township authorities, at any time before they had signified an acceptance of the first selection.

(3.) The act of April 30, 1802, provides, that where section 16 "has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of said township for the use of schools." And the act of March 3, 1803, provides, "that the sections of land heretofore promised for the use of schools, in lieu of such of the sections number sixteen as have been otherwise disposed of, shall be selected by the secretary of the treasury, out of the unappropriated *reserved sections* in the most contiguous townships." The *reserved [126 sections here spoken of are the four sections in the center of each township, reserved by section 3 of the act of May 18, 1796. 1 L. & B. 466. The lands in the south end of said tract C were not in any "reserved section," and consequently their selection by the secretary of the treasury was clearly contrary to the express letter of the law. This is a good reason why the selection was

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rescinded, and another selection made. But, even waiving this point, the fair *presumption* from the fact of the non-acceptance of these lands by the township authorities, and the selection of other lands in their stead, which both parties have acquiesced in since 1819, would be, that the first selection was found not to have been made in accordance with law, because the lands selected were not "equivalent" in value to section 16, which had been disposed of.

(4.) The court will not, upon this evidence, make a decision, ignoring the title of T. 5, R. 10, to school lands held and enjoyed, under the authority of the United States, for more than thirty-three years. For, if there is an outstanding title in the lands here claimed, as school lands for T. 5, R. 10, it follows that said township has no right to the lands she has been so long enjoying as school lands.

(5.) The letter of the *secretary*, July 13, 1805, explains how said lands came to be marked "school," etc., on the old tract-book at Marietta, and how the trustees of T. 9, R. 11, happened to fall into the mistake of taking possession of them as their school lands, instead of section 16. These entries in the tract-book were unquestionably made in consequence of the selection of July 13, 1805, which was afterward abandoned. And there can be little doubt that the trustees of T. 9, R. 11, finding the lots marked "school land" on the tract-book, very naturally concluded, that they were school lands for the township in which they lie, and took possession of them accordingly.

127] **John E. Hanna*, for defendant:

I. The land was not subject to entry at the time it was entered by the plaintiff.

On April 21, 1792, the United States granted to the Ohio Company three tracts of land; the first tract of 750,000 acres, in which was reserved section 16 for school purposes, and section 29 for purposes of religion, and lots 8, 11, and 26, in each township, for future disposition by Congress; the second tract of 214,285 acres, without any reservations whatever. There was then no general act reserving land for school or any other purpose, and it was before the propositions that were afterward made to the convention forming a constitution for Ohio, which was modified and accepted by them from the United States; so there can be no doubt but what Congress had the power to thus grant the whole, and they intended so to do. Such was the understanding of the company. The trustees, finding there

was no school land reserved within this tract, appropriated section 16 in each township for school purposes. After the proposition made to the convention, which was modified and approved, the United States supplied a section of school land for each of the townships within this tract of 214,285 acres. The third tract consisted of 100,000 acres, usually called the donation tract; this conveyance, like the preceding one, did not reserve any school land. But this tract was conveyed in trust to the trustees of the Ohio Company, to be by them conveyed in fee as a bounty to actual settlers, being males not under eighteen years of age, free of expense, within five years from the passage of the act; and all of that tract that was not conveyed within five years reverted to the United States. See Land Laws, 45, sec. 3. This was to be conveyed free of expense to males not under eighteen years of age, actual settlers at the time of conveyance, each one hundred acres. At the time of this conveyance by the United States, this land had not been surveyed, and never was surveyed into sections. The conveyance [128 was to be in one hundred acre lots, and so the trustees of the company had it surveyed; and if the whole quantity had been conveyed away, there would not have been any school land within the tract. The United States so understood the matter, and afterward made provision to supply it to such portions of this tract as did not revert to the United States, as well as for the tract contained in the second section of this act.

The land in litigation is part of the 100,000-acre tract. By this act, the whole of the tract was withdrawn from entry, or even from the laws for surveying the public lands, and, therefore, was not subject to the law for surveying the public lands. The tract was surveyed by the company, and therefore was not subject to entry until so ordered by Congress by some subsequent act.

This land is not embraced either in the act of May 18, 1796 (Land Laws, 50), or the amendatory act of May 10, 1800 (Land Laws, 70). Nor is there, by either of these, any land reserved for school purposes. By the provisions of these acts, the whole land was to be surveyed into ranges, townships, and sections; and by the provisions of section 3 of the act of 1796, all the land containing salt springs, and four sections in the center of each township, was reserved for future disposition by Congress. But neither of these acts applied to the land in controversy.

Section 7 of the "act to authorize the people of the Northwest

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territory to form a constitution and state government," etc. (Land Laws, 84), contains propositions by the United States to the convention forming the state constitution, the first of which is that section No. 16 in every township, and where such section has been sold, granted, or disposed of, other land equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.

This act applied to land then owned by the United States, and 129] *where section 16 was not disposed of, it was appropriated for the use of schools. But the whole donation tract, including section sixteen, was disposed of at that time. Then follows the act of March 3, 1803. Land Laws, 88.

This act makes appropriations for different parts of the State of Ohio of school lands. And the fourth proposition is, "one-thirty-sixth part of all the lands of the United States lying in the State of Ohio to which the Indian title has not been extinguished, which may hereafter be purchased of the Indian tribes by the United States, which thirty-sixth part shall consist of the section number sixteen in each township, if the said land shall be surveyed in townships of six miles square, and shall, if the lands be surveyed in a different manner, be designated by lots." The third section confers the power upon the secretary of the treasury of selecting a section of land where section sixteen has been disposed of.

By section 7 of the act passed March 3, 1803 (Land L. 130), the reserved sections are ordered to be sold, excepting section sixteen.

By the act of February 20, 1808 (Land L. 163), "the reserved sections, except section 16 and the salt spring reservations, are put to sale as other United States lands." So that, after this period, the secretary was not limited as to the land he was to select to supply section 16, disposed of.

Counsel suppose it will be conceded that no United States land was ever subject to entry, or in market, until surveyed by the United States. The donation tract was not so surveyed. The reverted portion was surveyed, and ordered to sale under the act of March 18, 1818 (Land L. 296, secs. 1 and 3). This survey was to be made and returned to the general land office and to the Marietta land office. Thus, each return was alike obligatory and evidence; and there is in evidence in this case a copy of the return made to Marietta land office, under the hand of the register, and the land in

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dispute marked school land. This plat shows that the land was, as allowed by the last-mentioned act, surveyed *into 100-acre [130] lots, and not sections. If the land had been surveyed into sections, it is admitted that section sixteen would have been the school land for township nine, in range eleven, being the township in which this land lies, unless such section had been, by the trustees of the Ohio Company, disposed of to an actual settler; and that no patent or other evidence of title was necessary to pass the title;—the survey would have been sufficient. But the survey did not designate any such section, consequently did not point out the school land; and the law under which the land was surveyed and ordered to sale, reserved the proper proportion for schools (one thirty-sixth part) for township nine; and it is not pretended that any other land was ever appropriated for township nine but this tract.

The land was never surveyed into sections, but into lots, and the lots composing what might have been section 16 have all been sold by the United States, and patented, and individuals have improved and used them for years. If we disturb this arrangement of the government, the present owner of the land would have to surrender it to the township, getting his purchase money back, but nothing for his improvements, while the plaintiff's lessors would get this school land, with all the improvements, for the price of wild lands.

It is argued for the plaintiff, that the "lands in the south end of tract C were not in any reserved section, and consequently, their selection was clearly contrary to the express letter of the law. It has already been shown that what plaintiff's counsel calls the reserved sections, and from which alone the secretary could make selections, were, by the acts of 1805 and 1808, put to sale as other public lands, and therefore he was not limited, after that time, to make selections from those sections. But the act of 1818 did not require the reservation in any particular part of the reverted land, or that a particular section should be reserved, but it only reserved from sale the proper proportion for school land. The act itself is silent as to who was to make the selection *but the proportion was [131] to be reserved from sale, and the sale was made, each tract being required to be first offered separately at public auction. Is it a very forced presumption to say, that the selection or designation was made by the proper officer, when the land could not have been offered for sale without the school land having been designated, because it would not do to have offered, and when all was sold but the

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proper proportion for school, and then that to be the school land? The township was entitled to have not only the quantity, but also a chance at least of an equal quality, and it was to be in adjoining lots. But even if the township was to take the last section not sold, we have shown that the whole of tract C was sold by the government many years before the plaintiff's lessors entered the land in dispute, and that the township was in possession of this tract of land, as its school land, when the entry was made.

If this land had been surveyed into sections, and section 16 had been found in the reverted land, the survey and designation of the section would have passed the title. But when surveyed into lots, the designation had to be made. The act is silent as to who was to make the designation, and no part of the land could be offered for sale until the school land was designated. See proclamation of the President, dated March 20, 1819, ordering this reverted land to sale, and reserving from sale "such lands as have been or may be reserved by law for the use of schools and other purposes." Who was to make the designation, and from what part of the tract? The law did not make it. We find it designated in the proper office, where offered for sale, on the plat of the surveyor, on the tract-book in the register's office, and in the handwriting of the register. There is no pretense that any other or different selection was ever made of school land for the township in question. Is it a violent presumption to suppose that this selection, so evidenced, was by the proper officer?

The transcript from the general land office shows, that "an equal 132] portion of tract C, lying in township 9, range 11, *within the said donation tract, and to be laid on the south end of the same," was selected, for school land, for township 5, and range 10, by the secretary of the treasury, July 13, 1805. But it appears that, afterward, another selection was made for that township. If this selection was proper, and the secretary had authority to select, his act of selecting vested the title in the State of Ohio, and would have required an act of the legislature to have divested it. No such act is pretended to have ever passed that body, and, without such, the secretary could not have set aside a selection made by him; and this is perfectly fatal to the plaintiff's case, whether the defendant has a title or not; for the plaintiff must have a good title in order to recover; and if we show a title out of him, he fails. But we rather think that the secretary could not at that time have made

the selection, as this land has not been surveyed; and hence the designation that appears upon the plat and tract-book, was made by lots, therefore after the survey, and made under the act of 1818, and not at the time of the designation, made in 1805, by the secretary. There had been no act of the United States setting up claim to this land, after the grant to Putnam and others; and we take that to be the reason why the secretary afterward had a different selection made for township 5, in range 10.

This second designation was made by the secretary on the 17th day of November, 1819, after the survey of the reverted land, and finding no section 16 in township 9, and no school land for that township, but the lots marked on the plat and tract-book, and they so marked for the township in which they were. Now if this land was not subject to entry at the time it was entered by the lessee of the plaintiff, the plaintiff must fail, for his title is bad; the patent is void. *The Trustees of Township One v. John Campbell*, 17 Ohio, 267; 13 How. 244; *Wilcox v. Jackson*, 13 Pet. 512.

II. But there is another view of this case. Lane was in the actual occupancy of the lot in question when the entry was made. *The land was entered by laying on it a military warrant, [133 issued under the act of September 28, 1850. Section 3 of that act provides, "that no land warrant issued under the provisions of this act shall be laid upon any land of the United States, to which there shall be a pre-emption right, or upon which there shall be an actual settlement and cultivation, except with the consent of such settler, to be satisfactorily proven to the proper land officer." *Brush v. Ware et al.*, 15 Pet. 108. A patent appropriates the land called for, and is conclusive against rights subsequently acquired. But where an equitable right, existing before the date of the patent, whether by first entry or otherwise, is asserted, it may be examined.

III. If there was no school land reserved for this township till the act of 1826, certainly that act, which was to supply all deficiencies, made provision for it. This land might have been so selected. Is it a forced presumption to say that it was so selected? See circular of Graham, com. of gen. land office, May 24, 1826, Pub. Doc., part 2, p. 395. This circular must have come to the register of the Marietta land office, and if no selection had been made before that time for township 9, a selection must have been made. See also circular from the general land office, dated August 30, 1832, Pub. Doc., part 2, p. 468.

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We find that the tract-book of the Marietta land office is substantially marked as required, and that marking in that hand-writing of Wood, the then register of that land office; and that, about that time, the trustees of that township took charge of that land, and have been in possession of it ever since. And we learn further, that when the books and the papers of the Marietta land office were transferred to the Chillicothe land office, they were so marked; and that as the tract-book was much used and somewhat dirty, that in 184—, the register clerk of the Chillicothe land office had it transcribed, and that his clerk, through mistake, omitted to transcribe the marking upon it "school," etc. Now, this mistake of the 134] clerk should not prejudice defendant's rights, *or the rights of the township, and if even the marking was not in the precise words of the circular, that can make no difference. The intention of the marking was to show that the land was not subject to entry. And perhaps, if it had been selected for a different township than the one in which it lay, then something should have been shown, so as to let it be known for what township it was intended.

But this marking is at least *prima facie* evidence of an appropriation of the land for school purposes, and the fair presumption would be, that it was for the township in which it lay—what would have been and certainly was the case of individuals, when they went to the Marietta land office to enter land, and on an inspection of the tract-book in reference to this land, finding it thus marked. Can there be any doubt but they understood that to be school land for that township?

IV. See letter of Mr. Gallatin, July 13, 1805, Pub. Doc., part 2, p. 260. This shows that tract C was not surveyed, or the lots would have been designated by numbers.

V. The secretary had the power of selecting, and his act alone appropriated the land and passed the title. No patents or certificates of entry or appropriation ever issued, but the mere designation in the books of the land office passed the title, and the register was advised thereof, and his tract-book marked, so that the land would not be sold. And counsel for plaintiff are mistaken in supposing that the marking on the return made by the surveyor, and on the tract-book, were made in consequence of this designation by the secretary in 1805, for the reason before given, this land was not surveyed at the time. If the designation had been made before the survey, the surveyor would not have divided the portion selected

into one hundred acre lots, but would have run off six hundred and forty acres in one body, being that portion for township 5; but he surveyed the whole land into lots, and then, as by the act of 1818, he made the selection of school land for that township, as by the act he was *required to do, and hence the designa- [135 tions on his survey as returned to Marietta, and on the tract-book in that land office in the handwriting of the register of that office, and by so marking, the land was not only withdrawn from entry, but the legal title passed, and this is the only way the legal title has ever passed from the United States for any of the school land.

Arius Nye, on the same side :

I. The real defendant is township 9, range 11, within the donation tract. As that tract was not, at any time, actually surveyed into sections, the township, though entitled thereto, under the acts of Congress of 1802-3, and the intent of the contract, etc., under which the Ohio Company purchased, never acquired or received section 16, reserved for schools, or any school section, as such.

II. The township, then, was entitled to school land (in "proper proportion," at least), when the act of March, 1818, was passed, providing for a survey of the ungranted, undonated *residuum* of the donation tract, not before surveyed or brought into market, and consisting of several detached, separate, and irregular parts or parcels, in different parts of the whole tract. This *residuum* could not be surveyed into sections in the legal statutory sense, for the reasons here stated, and apparent.

III. The township, by its tenants, or those holding under it, in its right, has been in actual possession of the land now in controversy, for more than twenty years, claiming it as school land. It had a right to this land when the plaintiff's lessors attempted to acquire a title to it by entry. If this was reserved school land, when that attempt was made, they acquired no title to this particular land, whatever may be their rights elsewhere.

IV. This action is in the nature of a writ of entry; and therein the plaintiff must show to the court by strict, peremptory, necessary law, such a right and title as shall require the court, in the application of such law, to send its administrative officers to put defendant out, as a wrong-doer.

*V. If, upon a view of the whole history of the case (for [136 history is incidentally concerned here), of the facts and the law, the

question whether the lessors of the plaintiff show an absolute, overruling right to the land, shall even appear to be balanced, in doubt, or equipoised, the scale must then turn against the (real) plaintiffs and hence in favor of the defendants. 1. Because the plaintiff will have failed to make out a complete, clear, and perfect title as against defendant; and 2. That under the facts, the circumstances and law of the case—as they are now here, the *presumptions*—applicable and present in the case, are, and should be held to be, altogether in favor of the defense.

VI. But the scale of the defendant does decidedly preponderate:

(1.) The act of 1818 provided that this *residuum* of the donation tract should be surveyed into sections or 100-acre lots (as the grants by the trustees had been), at the discretion of the surveyor-general, by whom or under whose direction the survey was to be made. The surveyor adopted the plan of surveying into 100-acre lots. The legal condition of this *residuum* was peculiar; and the mode of dealing with it, and of acquiring titles in it, and the questions arising under the laws respecting it, must be ascertained and adjudged by this particular law, so far as it applies.

(2.) Section 3 of that act reserves from sale “the proper proportion of school land,” but it does not (like the act of 1826, providing for fractional surveyed townships, which happened, from being fractional, to have no section 16 within them), provide who should designate this “proper proportion” of the land to be surveyed under its provisions. The secretary of the treasury is not named, as the government officer who was to designate, mark, and indicate these *reserves*: it can not be assumed, therefore, that he was to do it. The quantity, shape of parcels, positions, etc., were to be ascertained by an actual survey, not theretofore or then made, by or under the [137] authority of the *surveyor-general. The inference, in the absence of any other express direction, or named officer, is, that he was to see, or take order, that these reservations—not, necessarily, appropriations—should be made when the surveys were made; since the quantity of lands, etc., were, till then, uncertain. The country, about these residuary parcels, was then actually settled; our people were there; the range and township lines had been run, but not any sectional, or other subdivisinal lines—except those of the 100-acre donation lots—which the trustees had surveyed and granted to actual settlers; these inhabitants, in their townships, were as much entitled to school lands as those of other parts of the

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Ohio Company's purchase, or of the state; Congress, by the act under consideration, intended and provided, that such land should be secured to them; and, if the quantity reserved and designated, within any township, was, or is, more than it would be entitled to, by prior acts of the government, that is a question solely between the township and the government, and is not one that can properly be made here for decision, by the locators of warrants under the bounty act of 1850, which act, too, in explicit and peremptory terms, has *prohibited* the location of any warrant, issued under it as a bounty, upon any land upon which there was, at the time, an actual occupant, or to which there was a pre-emption right, as was the case here, of occupancy: the actual occupant, or the land which he so occupied, was, by the act, shielded by the power of the government, and thereby protected from the attempts of holders of such warrants, to speculate upon him or it; by what right he occupied, in fact, was not left, by Congress, an open question, or one to be raised, or put, by the mere holder of a bounty warrant, or any other person, coming merely to acquire title by purchase under the general laws for sales.

VII. The plats and returns of these surveys were to be made and returned to the register of the land office, at Marietta, and to the general land office. It was to be *presumed* that the *surveyor- [138 general, the surveyors under him, and the register of the land office would do their duty, as well in fulfilling the matter of making the surveys, etc., as in respect to the expressed intention of Congress to 'reserve' the "proper proportion for schools," since no other officer was named, required, or authorized, by the act, to make and designate such reservations.

VIII. The transcript by Judge Wood, register at Marietta, of the plat and survey, in his office, of the tract in which the disputed land lies, designated the lots in question as "*school land*;" the original tract-book of the office does the same. These lands or lots have been claimed by the township, and occupied by their tenants, for more than twenty years, as their, or *its* school land, and lie, too, in that township, whilst other lots in the same survey have been, and are marked as "*sold*." How, then, came the lots in question to be marked on the plat, and designated on the tract-book, as "*school land*," and to remain for thirty or thirty-five years unsold? Is it not, in the absence of any other direct and satisfactory evidence to the contrary, to be inferred, or *presumed*, to have been done by the

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authority and directions of the surveyor-general, directly or indirectly, and thus made to appear in the office of the register of the land district? Being so, the plaintiffs here acquired no title to the land in controversy; it was not the subject of sale, entry, or location.

IX. But further: It is to be *presumed* that these officers of the government—the surveyor-general, register, and any other officer, or subordinate, who had a duty to perform, under this act of 1818—did their duty; on the other hand, it is *not* to be presumed that they violated their duty—by marking and designating these lots of the survey as “school land,” upon the plat and tract-book; for the plat in evidence is in the hand of Judge Wood, the register—so must have been the tract-book, in which they were, in like manner, designated. Nor is it to be assumed, that any other person than the 139] proper officers surreptitiously, *or fraudulently, so marked these lots; still less that these officers committed a fraud in what it appears they did.

X. As there has been no prior survey of this land into lots, before its division under the act of 1818 into 100-acre lots and fractions, this marking and designating of the 100-acre lots and a fractional lot, in question, must have been after and under the provisions of that act. This could not have been by the secretary of the treasury in 1805, as is assumed, without proof, on the other side; there were then, and had been, no 100-acre lots to mark and designate. Therefore, these designations could not have been made then, or for the purpose assumed. But even if this designation were made afterward (which is not conceded), under the direction of the secretary, it withdrew the land from sale and entry, or location, till some further action of the government or its officers should give it a specific appropriation or use.

To find section 16, by extending or protracting lines upon paper, might make a section thereon, but would not be, or bound, a section surveyed and marked—which only is a section of land—but the mere *ideal* of it.

XI. Defendant is entitled, however, to the benefit of the presumption in his favor, under the act of May, 1826.

XII. But the plaintiff's lessor acquired no title to this land:

1. It is *not* the patent that passes the title to the land from the government to the purchaser of government lands; it is the law, and acts done in conformity to it—under which the sale, etc., is as-

sumed to be made—that transfers, or passes the title, from the government to the grantee. The government has the dominion and direction of its lands. It prescribes the terms, conditions, and restrictions by and subject to which, only, can private rights and titles to public lands be acquired. If a sale, or the acts of the officer and purchaser, is or are not authorized by the law relating to the land sought, or conformable to it, no title passes. See *Wilson v. Mason*, 1 Cr. 45; 1 Peters Cond. 342; *Wilcox v. Jackson*, 13 Peters, 498; *Campbell et al. v. Lessee of T. 1, R. 19, 13 Howard*, 244. *A patent, then, issued upon an alleged sale or entry, not [140 made in conformity to the law directing or authorizing or restricting a sale, is void; and any person in possession of the land, claiming title, may impeach it. See *Brush v. Ware*, 15 Peters, 108. The officers make the sale; the issuing of a patent upon it is merely a ministerial act, evidencing a (previous) sale, if duly made; and if not so made, the title does not pass. Any other doctrine would be contrary to policy and principle, and would be a direct encouragement to fraud and trickery, both upon the government and those who are protected in their actual possession by its acts; or it would enable the land officers to make false titles, and thereby impose on the government, and the subjects of its special and declared protection, by law; it would be to pass a title to public lands, not by law, but in contravention of it, and put the government to the necessity of judicial or legislative proceedings to set aside an act done by its own officers, under pretense of law, but against the law. That a party, having a prior equity, may have such an assumed or apparent title examined and impeached, has, at least, been decided. See the case last cited, 15 Pet.

2. The proviso of the bounty act of 1850 (sec. 3) protected the land from location. The occupant's seat upon the land could not be taken from him but by his own consent, to be judicially proved before the register, "to his satisfaction." In any other case, ordinarily the government officer, in passing an entry, acts ministerially (see case cited, 15 Pet.); and even where an affidavit is produced, he does so—for he merely then looks at the purport of it, and the formal verification, and does not, and can not, in pre-emption cases, judge of its *verity*. *Wilcox v. Jackson*, 13 Pet. 398; *Bush v. Ware*, 15 Pet. 108. Here, however, there was not even an attempt to comply with the proviso—nothing was done in this re-

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spect, either judicially or ministerially. Therefore, no *presumption* or effect can be assumed for the locators.

141] **C. B. Tompkins*, replying for plaintiff:

I. The plat of tract C, referred to by the secretary of the treasury in his letter of July 13, 1805, must be examined in connection with that letter before it can be clearly understood. This letter says: "By an inspection of the plat" (that is, of tract C), "it will be seen that in the 100,000-acre tract there were only four entire sections and four fractional sections No. 16, one of which last, being included in tract C, was not ceded by the Ohio Company, and remains undisposed of." This fractional section No. 16, being included in tract C, and tract C being wholly in fractional township 9, range 11, it, of course, is the school land for this township, and can be pointed out now just as easily as if the township was laid out into sections. Lay off this township into sections, and 16 will be found in the northwest corner of tract C, marked with a star on the plat of the 100,000-acre tract now in evidence.

Whether this land was ever surveyed into sections or not, is immaterial to this investigation. The secretary treats it as though it had been surveyed. He speaks of sections and fractional sections, their number, etc. From this, we might properly infer that the land was then surveyed into sections and numbered. The secretary says: "In lieu of the seven sections or fractional sections No. 16 contained in said tract, I have selected the following, viz." Then follow the selections made for eight whole townships; but none is made for township 9, range 11. The reason why there was no selection made for this township, while selections were made for one immediately south and another immediately east of it, was that it had within its limits a section 16, which, by the law of Congress, was the school land for this township.

II. The letter of the secretary, while it proves that there was a section 16 within tract C, and that tract C is wholly within this township, also proves that the land in dispute is not a part of said section 16, because the secretary then attempted to select this land for township 5, range 10. But there is no pretense that township 142] 5, range 10 has any title to this land now. It never took possession, and never concurred in the selection; and the secretary had no power to make it. Act of March 3, 1803, Public Lands, Instructions and Opinions, part 1, p. 90. The secretary had power, in

case 16 had been otherwise disposed of, to select out of the unappropriated reserved sections in the most contiguous townships; and to these he was limited. If any title, however, did pass by the selection, it reverted to the government when the subsequent selection was made, in 1819.

III. The presumption insisted upon by the defendant, as arising under the act of 1818, can not be sustained.

At the time of the enactment of this law, all the disposable land in this township was that contained in tract C, and amounted to 2,941 acres, except the usual school proportion, and it would be 1-36 part of 2,941 acres; which is a little more than 81 acres. This is all that could be claimed by force of this law.

IV. Before the defendant can claim any benefit from the act of May 20, 1826, he must bring himself within its provisions, by showing that this township had a right to select land, in pursuance of this act; and then, that the legal steps had been taken to make the selection. That is, he must prove that there was no section No. 16 within this township, or, if there was one, it had been legally disposed of prior to that time. But, if I am wrong in saying that this township had school land within its limits, and school land had to be selected, in pursuance of the provisions of that act, certain legal steps had to be taken before any title could vest in the township; and if these legal steps had never been taken, this township must remain without any school land.

The act of May 20, 1826, authorized the secretary of the treasury to make the selection. By the instructions of the commissioner of the general land office (page 467, part 2, "Public Lands, Instructions and Opinions"), the school committees, trustees, or other authorities having official cognizance over the school lands, were permitted to recommend selections; and if *they should fail to [143 do so, then it was made the duty of the register to report selections.

The register was directed, when he had reported any selections, to be careful and note by pencil-mark in his tract-book, and on the plat of the township, lands recommended to be reserved, and withhold them from sale.

Let me inquire, what had to be noted, in pencil-mark, on the tract-book? What words did he have to make with his pencil? He had to write on the tract-book, with his pencil, "Recommended to be reserved for school land, under the act of May 20, 1826." This is what his instructions and his duty required him to do; and if

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ever any selection or recommendation of this land was made, he did note this in pencil-mark, for the learned counsel say, the "law presumes a public officer will do his duty." This he was to write in his tract-book, and on the plat of the township; and when advised of the approval, by the secretary of the treasury, he was then to write in ink on the tract-book, "Reserved for schools, under the act of May 20, 1826," as per letter of —, from the commissioner of the general land office; and on the plat, say "school land." These things had to be done before the title vested in the township. The register at Marietta had to make the selection, and report to the secretary of the treasury. He had either to approve or reject, and to advise the register at Marietta. When this was done, the land vested in the township, for the use of schools, and not till then. The man that claims title under this act must show that these steps have been taken, and show it by competent evidence.

The ink-mark of "school" on the tract-book, by the former register, is no evidence that this land was ever selected as school land. No regulation of any department authorized any such writing in the tract-book.

In addition to the duties already stated, the register was required to retain a copy of his report recommending lands for selection. But no such copy appears.

144] *V. If this land had been selected by the secretary of the treasury, there would certainly be a record in his department of this selection. It can not be that, in regard to this particular selection, all the officers having anything to do with it wholly and entirely failed to do their duty. Counsel for defendant say, with emphasis, "the law presumes that public officers will do their duty." But there is no record of any selection of this land to be found in the treasury department.

VI. The testimony as to the mark in question is entirely incompetent. To admit it to a jury, would be a violation of the rule which requires the best evidence the nature of the case will admit of. The best evidence of selection would be a copy of the record in the treasury department; the next best, would be the further entries on the books in the land office formerly kept at Marietta, but now at Chillicothe. This would be legal testimony to prove title in the defendant. But if he can not produce it, he must account for its non-production, by showing that such evidence was once in existence, but has been lost or destroyed. But there is no attempt at anything

of this kind. No one pretends that there ever was any other record of the selection than what is now to be found.

VII. If it be claimed that this land was selected prior to the instructions requiring these particular forms to be adopted, nevertheless there must have been a record, or some authentic writing, of the selection, somewhere. It can not be pretended that, because this selection was made before the register received instructions from the secretary of the treasury as to the particular steps to be taken, therefore the land could be selected, and no record or entry made, in any department of the government, of the fact.

VIII. There is no difficulty in accounting for these marks on the tract-book. They were, no doubt, made when the letter of July, 1805, was received. They were made in ink, and there they remained until 1819, when other land was selected for township *5, range 10. If these marks were so made, they are no [145 evidence of title in the defendant; and it has already been shown that, by that selection, no title to this land vested in township 5, range 10. At the time other land was selected for the latter township, the register may, perhaps, have forgotten these marks on the tract-book, and they were suffered to remain. During this time, this land, no doubt, was called school land; and when the inhabitants of township 9, range 11, began to look about them for school land for this township (this being called school land), they, of course, supposed it was the school land for this township, and took possession of it under this impression, and so have occupied it ever since.

There are other circumstances, which strongly sustain this position. It will be seen by an inspection of the plat of tract C, which is now in evidence, that lot No. 34 is almost entirely disconnected with the remainder of this land. Now, why was this lot 34 taken instead of lot 11? For no other reason than that the secretary of the treasury, in his letter of July 13, 1805, directed that the south end of tract C should be taken for school land, for township 5, range 10; and, if lot No. 34 had not been taken, the whole of the south end of tract C would not have been taken. The court will also bear in mind, that in 1805 this land was not laid off into lots, as it now is; and hence, the secretary could not describe the quantity by lots, and the only convenient mode of describing this land, was to describe it as the south end of tract C. It is not probable that if the register of the land office, or any other officer, selected school land out

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of tract C, after it was surveyed into lots, that he would have taken it all in one body.

IX. But again, without lot No. 34, there is more land than township 9, range 11, is entitled to. This township, being less than three-fourths of a township, is only entitled to three-quarters of a section. The township is now claiming 641 acres. These circumstances strongly fortify the position I take; and most clearly demonstrate that this land was not selected under the act of May 20, 1826.

146] *But there is yet another very important difficulty in the way of the defendant. This township, being a fractional one, is only entitled to three-quarters of a section, but has selected more than a section. Is not the selection void? It is a power given by statute, and must it not be strictly pursued? The power must be exercised within the limits granted. This township never can have any legal right to more than 480 acres of this land. Then, which four hundred and eighty acres is it that the township is to have? It can not be pointed out; the boundary can never be ascertained. A deed, under such circumstances, would be void for uncertainty; and is the title, by which the defendant holds, any better? Can anybody show the difference? There has been a defect in the execution of this power. Is there any legal remedy? I say there is not. When a power is given, if, in the attempt to exercise it, the power is exceeded, is not the act void?

Township 9, range 11, can not pretend to claim but four hundred and eighty acres of this land. Which four hundred and eighty will it claim? What tenants, now in occupancy, will it defend and sustain in the possession, and what ones will it suffer to be turned out?

The title is just as good to one part as it is to all the rest, and no better. It is no title to any. In the attempt to grasp too much, it has lost the whole.

C. B. Goddard (confining himself to the question of the validity of the plaintiff's patent) submitted the following:

The land in dispute was entered by Samuel A. H. Marks, and the patent issued to him. It appears in evidence, and is recited in the patent, that the land was paid for as follows: one-fifth in money, and four-fifths in a warrant issued to Marks, for services in the Florida war, under the act of September 28, 1850.

This is a mere question between the government and the purchaser of the land as to the mode of payment. So far as regards

this question, the land was subject to entry. Had it all been paid in money, no such question could have arisen.

*It is of no consequence to the party in possession of the [147 land how it is paid for. The government requires gold and silver. If the payment had been made in bank-notes, could the party in possession have objected? Can he object if payment is made partially with a land warrant? But further. Payment with a warrant was lawful, if made with the consent of the settler, "to be satisfactorily proven to the proper land officer." Can any inquiry be made, after the entry and the issue of the patent, and especially after a conveyance by the patentee, to third persons, as to the manner in which the land officer was satisfied of the settler's consent? One would think that the patent excluded all such inquiries.

The authorities cited by Mr. Nye do not sustain him.

Wilson v. Mason, 1 Cranch, 45, was a case of cross caveats. No patent had issued to either party. Each claimed the right of location, and the validity of their respective claims was the subject of the controversy.

Wilcox v. Jackson, 13 Peters, 498, was the Chicago case. The plaintiff in the ejectment claimed a pre-emption right; the defendant was the commanding officer of a military post under the authority of the United States. There is nothing in the judgment of the court, or the language of the judge who pronounced that judgment, which favors this position of the present defendant. It was held that the land was reserved from sale. It could neither be entered, nor claimed by pre-emption. The dispute was not whether it could be paid for in a particular mode, but, could the land officers of the United States sell it at all. The case is a good authority to prove one point for the defendant here, if that point had not been from the beginning conceded by us, namely, that if it appear that the land now in question was not subject to entry at all, our patent is void.

To this point also is the case of *Campbell v. Lessee of Township 1, Range 19*, 13 Howard's U. S. 244; S. C., 17 Ohio, 267.

Brush v. Ware, 15 Peters, 108, may be dismissed, with the single remark that the case was in equity.

*So much for all the cases cited in Mr. Nye's argument. He [148 might have gone further and cited *Stoddard v. Chambers*, 2 Howard, 234, and *Mills v. Stoddard*, 8 Howard, 345. The land was reserved from sale, and the patent held void.

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In opposition to the doctrine asserted by the counsel, and which his cases do not sustain, I cite *Bagnell v. Broderick*, 13 Peters, 436, which fully sustains the view we take.

THURMAN, C. J. In *Ward's Lessee v. Barrows*, 2 Ohio St. 246, this court, speaking of official acts, said: "The law will presume all to have been rightly done, unless the circumstances of the case overturn this presumption, and, consequently, as stated by the Supreme Court of the United States, in *Bank of the U. S. v. Dandridge*, 12 Wheat. 70, acts done which presupposes the existence of other acts to make them legally operative, are presumptive proof of the latter."

And, again: "Facts presumed are as effectually established as facts proved, where no presumption is allowed; and hence, in accordance with this long-established rule of evidence, the court, in *Lessee of Winder v. Sterling*, 7 Ohio (pt. 2), 190, were entirely justified in saying that the act of the auditor in allowing the credit, and making the certificate, which could only be lawfully done after the delinquent list had been verified by the collector, was presumptive proof that the oath had been administered."

Apply these principles to the facts of this case. "The lands in controversy lie in township 9, range 11—civilly, Windsor township, Morgan county—and are a part of that portion of the "donation tract" which reverted to the United States. As early as 1834, more than sixteen years before the inception of the plaintiff's title, they were taken possession of by that township, claiming them as its school lands, and have been thus possessed ever since. At the time this possession was taken, they stood designated on the proper book and map in the land office at Marietta, as school lands, and they 149] have ever since remained *so designated. For the omission, accidental no doubt, of this designation in the new tract-book made in 1840, after a change of registers and the removal of the land office to Chillicothe, can not affect the subsisting designation to which I have referred. In addition to these facts, it is admitted that if these lands were not selected as the school lands of Windsor township, then no selection for that township has ever been made. And it is also to be observed, that they have never been claimed as school lands by any other township; nor is there any evidence that any other township is without its school lands.

Now it does seem to us, that these facts warrant a presumption that these lands were properly selected as the school lands of Windsor township. We can not assent to the argument of plaintiff's counsel, that it was incumbent on the defendant to show an authenticated copy of the act of selection of the secretary of the treasury. The records and files of the register's office, coupled with the facts to which I have alluded, made a *prima facie* case for the defendant, and threw upon the plaintiff the burden of showing that no selection had been made. If the records at Washington contained no evidence of any such selection, it was for the plaintiff, under the circumstances, to prove that fact; and although it might not have been conclusive of the controversy, its proper weight would no doubt have been given to it.

It is argued, however, that the presumption of a selection was rebutted by facts that were in proof, and by others of which the court was bound, *ex officio*, to take notice.

1. "It can not be presumed," it is said, "that these lands were selected as school lands for said township 9, range 11, because at the time of the passing of the act appropriating section 16 for the support of schools, and for many years afterward, said township had within its limits original section 16, vacant and undisposed of, and therefore was not entitled to any other school lands."

The law here referred to, is the act of Congress of April 30, *1802, "to enable the people of the eastern division of the [150] territory northwest of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union," etc. 2 Stat. at Large, 173; 1 Chase, 72. By this act, certain propositions were made to the constitutional convention, to be holden pursuant to the act, which, if accepted by it, were to be binding on the United States. Among these was the following: "That the section, No. 16, in every township, and where such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools." The convention agreed to accept the propositions, provided certain additions and modifications were made by Congress; to which Congress assented by the act of March 3, 1803. 1 Chase, 72-74; 2 Stat. at Large, 225.

But it is not clear that it was designed by this legislation, or compact, to appropriate section 16. specifically, within the bounds of the

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"donation tract;" for there was no such section within it, nor was it probable there ever would be. That tract had never been surveyed, or otherwise laid out, into sections, nor was there any reason to suppose that it, or any part of it, would be. It had been granted to the trustees of the Ohio Company, pursuant to the act of Congress of April 21, 1792 (1 Stat. at Large, 258; Swan's Land Laws, 21), for the purpose of being "conveyed in fee simple, as a bounty, and free of expense, in tracts of *one hundred acres*, to each male person, not less than eighteen years of age, being an actual settler at the time of such conveyance;" with a proviso, that such part thereof as should not be thus conveyed by the company, within five years from the passing of the act, should revert to the United States. Pursuant to this grant, numerous conveyances of hundred-acre lots were made by the company; and what part, if any, of the tract remained unconveyed, and had thereby reverted to the United States, was probably wholly unknown to both Congress and the convention in 1802. Now, it may well be that, under the acts of 1802 and 1803, it was not necessary that a survey, even into townships, should have been made, in order that the title to section 16 should vest in the state; but it does not follow that, in a tract that was not designed to be surveyed into sections, it was intended to grant to the state what would have been section 16 had the tract been so surveyed.

And when we remember that the whole tract had been granted by the government to the Ohio Company, and that how much of it had reverted was unascertained, it seems most likely that it was considered as falling within the denomination of "lands granted or disposed of," referred to in the act of 1802, and that therefore not sections 16, but, in the language of the act, "other lands equivalent thereto," were intended as the school lands of this tract. And such, I may remark, seems to have been the understanding of Congress, when passing the act of March 18, 1818 (3 Stat. at Large, 409; Swan's L. L. 24), providing for the sale of the reverted portion of said tract; for, although by that act the right of the state to the usual proportion of school lands is recognized, yet no provision is made for surveying any section 16, but, on the contrary, the surveyor-general is authorized, in his discretion, to cause the land to be surveyed into hundred-acre lots; a division wholly inconsistent with the existence of a section 16.

Much reliance, however, is placed by plaintiff's counsel on sec-
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tion 3 of the act of Congress of May 10, 1800 (2 Stat. Large, 73), which required, it is said, a subdivision of the donation tract into sections. But this is a great mistake. That act, as will be seen by its provisions, and especially by its first section, required such lands *only* to be surveyed, or subdivided, as the previous act of May 18, 1796 (1 Stat. at Large, 464), directed to be sold. Now, certainly, no portion of the donation tract was directed to be sold by the act of 1796, for when that act was passed, no portion of the tract had reverted to the United States, nor could it be known that there would be any reverter. Besides, *section 2 excludes lands [152 previously patented, and therefore excludes the "donation tract."

But whether the act of 1800 is, or is not, more comprehensive than that of 1796, it is very evident that the lands referred to in section 3 are the same directed to be sold by section 4; and, as it would be unreasonable to suppose that the reverted lands in the donation tract were thus ordered to be sold without any step being taken to ascertain their site, description, or quantity, the position of counsel, that they were directed to be surveyed, can not be maintained.

2. "It can not be presumed," it is argued, "that the secretary of the treasury selected the lands marked 'school,' 'do,' and 'school lands,' on said tract-book, as school lands for said township 9, range 11, under said act of May 20, 1826, because the quantity is greater by one hundred and sixty-one acres and fifty-nine hundredths, than the law authorized him to select for that township, even if it be admitted that said township was entitled to have school lands selected under said act. Said lots numbered 7, 8, 9, 10, 11, 34, and 59, marked 'school,' etc., as will be seen by the plat, all lie adjoining each other in a compact form, and contain six hundred and forty-one acres and fifty-nine hundredths of an acre. It is admitted that said township 9, range 11, contains less than three-fourths of an entire township, and consequently, under said act of May 20, 1826, could only have three-fourths of a section, or four hundred and eighty acres, selected and appropriated as school lands."

To this point it might be replied that, under the circumstances, it would be more reasonable to presume a mistake in the quantity selected, than to believe that no selection at all was made.

But were it admitted that no selection was made under the act of 1826, that would not decide the case, for the selection may have and probably did take place before the passage of that act. There

was ample authority under the acts of 1803 and 1818 to make it, and no reason is perceived why it may not have been made. It is 153] true, that counsel say that the selections under the *act of 1803 were to be made out of the "reserved sections," so called, viz., the four sections at the center of the township; but it is to be remembered that there were no such sections, existing or contemplated, in the "donation tract;" that, by subsequent acts of Congress, these "reserved sections" were directed to be sold; and, finally, that the act of 1818 clearly had no reference to them.

It may be supposed, however, that the argument founded on said supposed excess of quantity, is as strong against a presumption of a selection before the act of 1826, as of a selection under that act. But this is not so. Windsor township is fractional, containing more than one-half, but less than three-fourths of a full township. If school lands were selected for it under the act of 1826, in compliance with the terms of that act, and without error, the amount selected would be 480 acres. But under the compact between the general government and the state, the township was entitled to a *full section*, and no act of Congress prior to that of 1826 had attempted to infringe this right, nor was that act designed to infringe it. Being thus entitled to a full section, if the selection was made before the act of 1826, the evident presumption is that that quantity was selected; and even if the selection was made under that act, it would not be unreasonable to suppose that the right of the township was respected.

That the right existed may be made quite manifest. The proposition hereinbefore quoted from the act of 1802, and which finally became matter of compact between the general government and the state, was, "that the section number sixteen, in *every township*, and where such section has been sold, granted, or disposed of, other lands *equivalent thereto*, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools." Here no distinction whatever is made between entire and fractional townships. "*Every township*," fractional or entire, containing a 154] section 16, is entitled to *it, if undisposed of; if disposed of, then to its equivalent. The language is too clear to admit of doubt; but if a doubt could be raised, it would be removed by a reference to the ordinance of May 20, 1785, and July 23, 1787, by the first of which it was ordained that, "There shall be reserved the lot No. 16 of *every township*, for the maintenance of public schools within said

township;" and further, that "when any township or *fractional part of a township*" shall be sold, the deed to the purchaser shall except and reserve "the lot No. 16, for the maintenance of public schools;" and in the second of which ordinances is the following provision: "The lot No. 16, in each township or *fractional part of a township*, to be given perpetually for the purposes contained in the said ordinance," viz., the above ordinance of 1785. U. S. Land L., Senate Compilation, vol. 1, pp. 13, 14, 24, 25.

These provisions show very clearly the policy of the government from the beginning, and render it quite certain that the comprehensive language of the act of 1802 was designed to embrace fractional as well as entire townships; and that each was to have the section 16 within its bounds, or its equivalent, is further shown by the fact that no attempt at an apportionment was made, as would surely have been done had it been designed to give the fractional townships less than full sections. Had there have been such a design, it would have been carried out by a provision declaring what proportion of a section a fractional township should have. But there is no such provision in any act we have met with, prior to that of 1826, except so far as such a provision may in effect be contained in the grant, by the act of 1803, of "one thirty-sixth part of all the lands of the United States lying in the State of Ohio to which the Indian title has not been extinguished, which may hereafter be purchased of the Indian tribes by the United States, which thirty-sixth part shall consist of section 16 in each township, if the said land shall be surveyed in townships of six miles square, and *shall, if the lands be surveyed in a different manner, be [155 designated by lots." 2 Stat. at Large, 226; 1 Chase 73. Now, taking into consideration the circumstances under which this grant was made, and especially the legislation already referred to, as well as the language employed, it is by no means clear that it was designed by it to give to a fractional township less than a full section, thereby departing from the previous policy of the government—from the policy of the act of 1802, to which the act of 1803 was supplementary—and making a difference between different portions of the country without any reason for so doing. But whether such was or was not the intention, is immaterial in this case; for this grant of the act of 1803 relates only to lands to which the Indian title was not then extinguished, and consequently had no reference to the "donation tract," the Indian title to which had long before

been acquired. It came under the before-quoted provision of the act of 1802.

Finally, it is argued by counsel, that the fact of the premises in question being designated as school lands, on the register's book and map, is explained by the letter of the secretary of the treasury of July 13, 1805, and that they were so designated in consequence of statements contained in that letter. See United States Land Laws, Senate Compilation, vol. 2, p. 260.

But this seems to us highly improbable. For, first, the letter contains no instructions to the register to make any entry in his books. Secondly, the designation is upon the "tract-book," which is the book by reference to which sales are made. Of course, a tract-book of the reverted lands in the donation tract must have been made *after* the survey of those lands into lots, preparatory to their sale. But this survey was made by Francis, in 1818, under the provisions of the act of that year, so that the tract-book in question, or at least so much of it as relates to these reverted lands, had no existence in 1805. It was doubtless made in 1818 or 1819.

Again, the designation on the tract-book is by lots, as surveyed 156] *and numbered by Francis, as above mentioned. This is apparent from a comparison of the book with his field-notes and map. The book was obviously made from the field-notes and map; and it is hardly necessary to repeat that the latter were made in 1818. Thirdly, that the secretary, in 1805, contemplated selecting the premises in question as school lands for township No. 5, range 10, is apparent from his letter; but that the selection was not finally made is reasonably certain. There is no evidence of it on the plat referred to in his letter; the lands were never claimed by that township; other lands were set off to it in 1819, of which it took and has ever since held possession; no allusion to any such selection is made in the act of 1818; in the survey made by Francis, under the direction of the surveyor-general, no respect was had to it, but, on the contrary, the premises were divided into lots; and, finally, Windsor township has held the premises ever since 1834, without any question of its right, save that now made by the plaintiff.

Upon the whole, we are of opinion that the motion for a new trial should be overruled, and judgment be entered for the defendant.

MAHLON EASTMAN v. WARREN W. WIGHT.

To enable this court to review the judgment of the court below, overruling a motion for a new trial because the verdict is claimed to be against the evidence, it must appear, either expressly or by necessary implication, that the bill of exceptions contains all the evidence given to the jury upon the trial.

All jurors must have the qualifications of electors; and if one, not having such qualifications, is retained upon the panel, without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain the fact when the jury is impaneled, a new trial should be granted.

To lay a proper foundation for a new trial, for such cause, it should be shown to the court, that the disqualification of the juror was unknown to the party *and his counsel, and that reasonable diligence was used before the [157 jury was sworn, by inquiry of the juror, or otherwise, to ascertain whether such objection to his sitting existed.

PETITION in error, to reverse a judgment of the district court of Crawford county, affirming a judgment of the court of common pleas of the same county.

The original action, which was one of trespass, was tried by jury in the court of common pleas, and a bill of exceptions was taken to the overruling of the defendant's motion for a new trial, a verdict having been rendered in favor of the defendant in error, then plaintiff. The defendant below attempted to justify as supervisor of roads. Among the reasons assigned for a new trial were the common assignments, that the verdict was against the evidence, against the law, etc. But the bill of exceptions does not state that all the evidence given at the trial is set forth—the language of the bill being that the witnesses, respectively, "*testified in substance*" as therein set forth; and in one instance, that a witness being recalled, "*made some explanations, and testified in substance as follows.*" Another reason assigned was that David Fulton, one of the jurors, was not, at the time of the trial, an elector of this state, and that that fact was not known to the defendant until after the jury had returned the verdict and were discharged. In support of this assignment, the defendant introduced the affidavit of Fulton, that he was called by the sheriff to fill the panel of the regular jury; that he was not, when the trial was had, nor was he when the affidavit was made, an elector of Ohio; that for the (then) last three years, or thereabouts, he had been a resident of Indiana, until about

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six months before the time of the affidavit, when he removed to Ohio; and that he was a citizen and elector of Indiana until October, 1853 (the affidavit is dated April 18, 1854); also, the defendant's own affidavit that he did not know that Fulton was an incompetent juror at the time of the trial, "nor did he consent to be tried 158] by said jury, *knowing the same to have any incompetent member thereon;" that "affiant was wholly unacquainted with said David Fulton, nor did said affiant know that said David Fulton did not have the legal qualifications of a juror, until after said jury had returned their verdict and separate; and during the pendency of the above motion for a new trial, if affiant had known that said David Fulton was not an elector or competent juror, affiant would have challenged him off said jury; and now affiant makes his objection at the earliest opportunity."

The court of common pleas having given judgment on the verdict for the plaintiff, the defendant (here plaintiff) filed his petition in error in the district court, adding to his other assignments of error, the following: "The testimony in regard to the survey of William C. Parsons is illegal, and was improperly admitted to the jury." The testimony referred to is not matter of express exception in the bill of exceptions; but it appears that one witness testified that he "was present when Parsons surveyed the route spoken of; acted as chainman. We started at the west end of the route, and chained through to about opposite plaintiff's house, and there set a pole," etc., giving the result of the survey; and several other witnesses refer to the same facts, in greater or less degree.

The judgment of the common pleas being affirmed in the district court, Eastman has been allowed to file his petition in error, the object of which is to reverse the judgment of affirmance.

S. R. Harris, for plaintiff in error:

I. Fulton was not a legal juror. Swan's Stat. 489, sec. 1; Const., art. 5, sec. 1; Swan, 491, sec. 8; Ib. 492, sec. 10.

II. Where a juror is incompetent, or a good cause of challenge existed, and that fact was unknown to the party before verdict, and he made his objection as soon as discovered, a new trial must be 159] granted. *Commonwealth v. Spring*, Am. Law *Reg., vol. 1, No. 7 (May, 1853); 5 Bac. Abr. 243; 7 Mod. 54; 2 Met. 558; 1 Scam. 128, and other cases cited in Curwen's Stat. 189; 1 B. Mon.

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213; *Briggs v. Georgia*, 15 Vt. 61; *McKinley v. Smith, Hardin*, 167.

[The other points of Mr. Harris are in reference to the weight of testimony.]

J. S. Plants, for defendant in error. No argument was furnished to reporter.

RANNEY, J. To enable this court to review the judgment of the court below, overruling a motion for a new trial, because the verdict is claimed to be against the evidence, it must appear either expressly or by necessary implication, that the bill of exceptions contains all the evidence given to the jury upon the trial. This has been the constant course of decision, and is affirmed in several reported cases. *Kepner, Adm'r, v. Sniveley, Adm'r*, 19 Ohio, 296; *Walker v. Devlin's Lessee*, 2 Ohio St. 593.

Indeed, the very nature of the inquiry demonstrates the absolute necessity of the rule. No question of law is involved, but it is simply an appeal from the jury on the facts; and without having the evidence given to the jury, it is impossible for us to say whether it justified their finding or not. When the bill of exceptions in this case is subjected to this test, it is very doubtful if it amounts to anything more than a statement of the tendency of the evidence, without expressly, or by necessary inference, negating the idea that no further evidence was given. But suppose the objection to the bill of exceptions removed; still it is to be remembered that this is the fourth time the same party has been permitted to reinvestigate the facts—twice before tribunals who heard the evidence, and twice before those who have acted upon an imperfect statement of it upon paper. Three of these tribunals have decided in the same way, and adversely to him. The jury, made by the constitution and laws the exclusive triers of the facts, have found a verdict; [160 the court in which this was done, and that heard the witnesses, has approved the finding. The district court has affirmed the correctness of the judgment of the common pleas. Under these circumstances, and with the imperfect understanding that we can get of the evidence, it must appear like the rashest presumption in us to overrule these repeated adjudications, without the clearest convictions that they were erroneous. We are not so convinced. The facts were strongly litigated, and while it would appear to us that

the weight of testimony was against the finding, this mere difference of opinion is not enough to justify an interference with it.

It is certainly clear that all jurors must have the qualifications of electors; and if one not having such qualification is retained upon the panel, without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain the fact when the jury is impaneled, a new trial should, for that cause, be granted. But it is equally clear that the proper time to take the objection is at the impaneling of the jury; and it must be taken to have been waived, unless the party is able to show to the court, upon the hearing of the motion, that with the exercise of such diligence he could not have taken the exception at the proper time. This is indispensable, to prevent constant mistrials, and to protect the rights of the adverse party; otherwise the party afterward taking the exception might lie by and take the chances of a verdict in his favor, and if given adversely, be entitled to a new trial as a matter of course. We have therefore settled, that to lay a proper foundation for a new trial, for such cause, it should be shown to the court that the disqualification of the juror was unknown to the party *and his counsel* at the time the jury was impaneled, and that reasonable diligence was used before the jury was sworn, by inquiry of the juror or otherwise, to ascertain whether such objection to his sitting existed. We have, at the present term, applied this rule in a criminal case of great importance—*Parks v. The State*.

161] *The necessity of showing the counsel ignorant of the objection is most apparent. In most cases he is better acquainted with the persons appearing in the jury-box than his client can be. He acts for the client as his authorized agent, and consequently binds the client by his acts in the management of the cause. In this, as in other cases of agency, his negligence is the negligence of the client, and his knowledge the knowledge of the client. If, therefore, he knows of the disqualification at the time the jury is impaneled, it is but right and justice to the other party that the objection should be then taken. Whether he had such knowledge or not can only be known to the court hearing the motion when it is made to appear by affidavit; and it did not appear in the present case. The objection to the juror, in this case, was of the slightest imaginable consequence, as it is not to be presumed that his judgment or honesty would have been materially improved by residing six months longer in the state. No valid objection could

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have been taken to the testimony given as to the location of the line. It is true that the recorded survey of a county surveyor is of itself only made evidence by the statute. But the actual location of a line, whether made by a county surveyor or not, may be shown by any one having a knowledge of the fact.

Judgment affirmed.

EDWARD N. SLOCUM v. LESSEE OF GUSTAVUS SWAN ET AL.

Where, in an action of ejectment to recover "the old penitentiary lot," in Columbus, E. N. S., the nature of whose possession does not appear in the record, was made defendant, entering into the common consent rule, and the then attorney-general signed a plea of not guilty, the record showed that, at a subsequent term, E. N. S. being called, came not nor further defended; that (a successor of the attorney-general who filed the plea having been *appointed and qualified) "the attorney-general of the State of Ohio [162 being also called, appeared, and declined further to defend the action;" and that "neither party requiring a jury," the court found E. N. S. guilty, and gave judgment for the plaintiff: *Held*, the issue made by the plea of "not guilty," could not be tried by the court. There was no waiver by the parties of a trial by jury.

PETITION in error to reverse a judgment of the court of common pleas of Franklin county, rendered at the June term, 1851.

The case is fully stated in the argument of Mr. McCook, attorney-general, which follows.

McCook, attorney-general, for plaintiff in error :

The action below was ejectment, brought in March, 1847, for the recovery of a tract of "land in half-section No. 26, township No. 5, of range No. 22, refugee lands, so called, commonly known as the 'old penitentiary lot,' in the city of Columbus."

At the April term, 1847, Slocum having been served with notice, appeared, entered the consent rule, confessing the lease, entry, and ouster, and was made defendant in room of the casual ejector. At the same time, the plea of not guilty was filed, signed "Henry Stanbery, attorney-general, for defendant," on which issue was joined.

The land, in fact, belonged to the state, and Slocum was in possession as quartermaster-general; but this does not appear by the record, nor is it anywhere shown that the state was interested.

The cause was continued from term to term until June, 1851, when, Mr. McCook being attorney-general, the record shows the following proceedings:

"And now at this day, to wit, the day and year first herein aforesaid, came the plaintiff, by Mr. Backus, his attorney, and thereupon 163] the said *Edward N. Slocum*, being three times solemnly *called to come into court and present his said defense, came not, nor further defends this action; and the attorney-general of the State of Ohio being also called, appeared, and declined to further defend this action; and thereupon, neither party requiring a jury, and the court being fully advised in the premises, do find that the said *Edward N. Slocum* is guilty of the trespass and ejectment laid to his charge, in manner and form as the said John Doe hath complained against him, and do assess the damages of the said John Doe, by means thereof, to one cent. Thereupon, it is ordered that the said John Doe recover against the said *Edward N. Slocum*, his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and also his damages, so as aforesaid assessed, together with his costs."

Slocum having been turned out of possession on this judgment, this petition is brought to reverse it, and it is now assigned by the plaintiff as error—

1. That after plea pleaded, judgment was rendered against the defendant by default.
2. That the court inquired of a question of fact in issue by a plea, without the intervention of a jury.

I do not know how to designate this judgment, but think I can show that it has been obtained in a mode unknown to the common law, or to the statutes, whether it is claimed to be supported as a judgment by default, by consent, or by trial on submission by the court.

The only mode of ascertaining the fact on an issue joined, known to the common law, was by jury. If no issue was joined, and judgment was rendered by default, damages were also to be assessed by a jury. The same practice prevailed in Ohio at the time of rendering the judgment below, except so far as modified by our statutes.

To sustain this judgment, it must have been rendered in one of three modes:

I. *By consent.* And this may be obtained in two ways—

*1. *By consent of the party.* This consent must expressly [164 appear by the record, for nothing is to be presumed to sustain such a judgment. In this respect, it is like a judgment by default.

Slocum, the defendant below, did not consent; for in person he was not in court, and it was not necessary he should be, as he had filed a plea. The record, showing that "he was three times solemnly called to come into court and present his said defense, came not," is conclusive that he did not consent. The words which follow in the record, "nor further defends this action," are mere mockery, when he had tendered an issue, in an action where the plaintiff recovers on the strength of his own title, and not on the weakness of that of his adversary.

2. *By consent of the attorney.* The novel practice of calling the attorney, appears in this record for the first time in Ohio. But they do not call the attorney of Slocum; but "the attorney-general of the State of Ohio," being also called, appeared, and *declined to further defend this action*. The record shows no connection between the state and this proceeding. Henry Stanbery was the attorney of Slocum, as appears by the record, and the affix of his then office, in 1847, to the signature of the plea, is mere *descriptio personæ*.

But even if, at the time of this judgment, the attorney-general for the time being had been the attorney of record, *he does not consent*. Consent is an affirmative act, which is wanting here; the record shows only that "he declined to defend this action."

I do not admit the authority of counsel, *as such*, to consent to judgment, their employment being to prosecute or defend the rights of their clients in courts, not to consent them away. The consent shown by the record must be that of the party; it may be expressed through the counsel, but is, nevertheless, the consent of the party, and must so appear.

II. *By default.* In the action of ejectment, the only provision for proceedings by default was against the casual ejector, *when [165 the tenant in possession neglects or refuses, after notice, to confess the lease, entry, and ouster, and it is in these words:

"That the plaintiff, on affidavit of the delivery of the declaration in ejectment, shall have judgment against the casual ejector, unless the tenant in possession, or landlord or other proper person, shall apply to be made defendant, and enter into the common consent rule, within the term to which the tenant had notice to ap-

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pear." Swan's Stat. 664, sec. 71. There could be no other default in this action on the part of the defendant, for, according to the practice in Ohio, the plea is filed with the consent rule. The other statutory provisions as to defaults have no application to this action, and do not help the judgment.

If this judgment had been properly rendered by default, it would then have been competent for the court to assess the damages, the statutory provision being as follows:

"That where judgment shall be entered by default against the defendant, the court shall assess the damages, unless the plaintiff or defendant *request a writ of inquiry*." Swan's Stat. 671, sec. 98.

But after an issuable plea, there could be no judgment by default whilst it remained on file. This is too clear for argument; but I refer to a few of the cases in which it is expressly ruled. *Harris v. Muskingum Manufacturing Co.*, 4 Blackf. 267; *Maddox v. Pullian*, 5 Blackf. 205; *Brown v. Hallenback*, 2 Greene, 319; 1 Tidd's Prac. 319.

A proper plea having been filed, it should have been disposed of.

III. *By trial.* This trial must be by jury, unless, by the consent of the parties, it is submitted to the court, and the intervention of the jury waived.

"In any action, etc., which may be pending in any court of common pleas of this state, when the parties to such action shall agree to waive the intervention of a jury, and to submit the case to the court, it shall be the duty of such court to try and determine the facts," etc. Swan's Stat. 691, sec. 158.

166] *The court will mark the difference between the language employed here, and that in the section before referred to, authorizing the court, in the case of a default, to assess the damages, unless the plaintiff or defendant requests a jury. Swan's Stat. 671, sec. 98.

In the one case, the court assesses the damages, unless one party *demand*s a jury; in the other case, when an issue is to be tried, the court can not act, unless both parties *wave* a jury.

In one case, the silence of the parties is sufficient; in the other case, they must expressly waive the right of trial by jury—a right guarantied by the constitution.

Does the record in this case show any such waiver of right, or consent to the determination of a different tribunal? The words of the record are, "and neither party requiring a jury"—the precise words adopted in the forms, for cases of default and assessment

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of damages by the court. This is an entry which could be made truthfully, if the party was absent or present, and yet his consent may have been withheld. The record should show affirmatively the act of the party waiving the trial by jury, and consenting to that by the court.

Notwithstanding this was wanting, the court tried the issue tendered by the plea, and found upon it; or rather, as the record shows that no evidence of any kind was introduced, "the court *being fully advised* in the premises, do find that the said Edward N. Slocum is guilty of the trespass and ejectment laid to his charge, in manner and form as the said John Doe hath complained against him." A distinct finding of the fact put in issue by the plea, for the trial of which the defendant below, at the only time when the record shows him to have been in court, had put himself upon the country.

I ask, then, that this judgment be reversed. It can not be maintained, as a judgment by *consent* of parties, for the defendant was not there to give it; nor by *default*, for he had his plea upon file, which put the proof upon the plaintiff; nor by *trial to *the* [167 court, for the record shows that the court had no authority to try it.

(No other argument was submitted.)

THURMAN, C. J. The issue made by the plea of "not guilty," could not be tried by the court, without a waiver by the parties of a jury trial. There was no such waiver. The judgment must be reversed, and a writ of procedendo awarded.

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The provision in section 19 of article 1 of the constitution, that "such compensation shall be assessed by a jury, without deduction for the benefits to any property of the owner," applies to all the cases mentioned in the section.

The word "jury," in that section, as well as in the other places in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties. And they may be sent to inspect the premises.

No valid appropriation of property for public use can be made without a *law*

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providing compensation to the owner, to be assessed in the mode prescribed in the constitution. The constitution, in this particular, does not execute itself.

As there was no such law in existence, when the proceedings to condemn Lane's property for the use of a road took place, nor any waiver by him of his right to a jury trial, the proceedings were invalid.

An assessment may be made by viewers in the first instance, provided a right of appeal is given to a court in which they may be assessed by a constitutional jury.

THIS was an application for leave to file a petition in error, to reverse a judgment of the court of common pleas of Trumbull county.
168] *The material facts, as shown by the record, are as follows:

At the March session, 1854, of the county commissioners of Trumbull county, said John Lamb and John McKee, with numerous other freeholders, presented their petition for the establishment of a county road, between points and upon a line therein described; which line passed through the lands of said Benjamin Lane. Proof that due notice had been given being made, and a bond as required by law being executed by said Lamb and McKee, as principals, with others as their sureties, the commissioners, at the same term, issued their order to three viewers, to view the proposed road, and if they, or a majority of them, should be of opinion that it ought to be established, then to assess damages pursuant to the statute.

At the June session, 1854, the viewers reported in favor of establishing the road, and that said Lane had claimed damages, and they had assessed them at the sum of \$500. Thereupon, Lane and others presented a remonstrance, and prayed for a review, which was accordingly ordered, and five reviewers appointed.

At the September session, 1854, the reviewers reported in favor of establishing the road, and the commissioners being of the same opinion, and also approving the assessment of damages, it was ordered that it should be established upon the payment of the damages.

From this decision Lane appealed to the probate court, wherein such proceedings were had, that, on October 17, 1854, his damages were assessed by a jury of six men, at four hundred dollars, which finding, with the other proceedings in the court, after being recorded, were certified by the judge to the county auditor, and laid before the county commissioners at their December session, 1854. Thereupon, the commissioners ordered that the road should be established upon the payment of said four hundred dollars into the county treasury,

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for the use of Lane, and the same being afterward so paid on February 28, *1855, an order was issued to the proper supervisor [169 to open the road.

At the March term, 1855, of the court of common pleas, Lane exhibited his petition in error against Lamb and McKee, praying a reversal of said final order of the county commissioners establishing said road, and assigning for error "that the said commissioners ordered the said road to be established without any opportunity on the part of the plaintiff to have his damages for the same assessed by a jury, as provided by the constitution of this state in his favor, and without any assessment having been made." And, as reasons for making Lamb and McKee, only, defendants, he represented that they were the only principals in the bond hereinbefore mentioned, and that they were the principal petitioners for the road, the other petitioners having no interest in the subject beyond the general interest, and, besides, they were very numerous.

To this petition, Lamb and McKee answered *in nullo est erratum*; and thereupon, at the same term, the cause came on to be heard, and the court reversed the order of the commissioners; whereupon Lamb and McKee moved that the cause be set down for further proceedings in the common pleas, which motion the court overruled.

To reverse this judgment of reversal, or, if that can not be done, to reverse the order overruling said motion, leave was asked to file a petition in error in this court; and the following errors were assigned, to wit:

1. The court erred "in holding for naught and reversing the proceedings and order of the county commissioners."

2. "In rendering judgment in favor of Benjamin Lane and against the plaintiffs."

3. "In refusing, after reversal, to cause a legal assessment of said Lane's damages, and neglecting to make any proper order in the premises."

4. "In holding that the assessment of said Lane's damages in *the manner shown by the record, was a violation of the [170 constitution of Ohio."

Birchard, in support of the application.

Sutliff & Tuttle, contra.

Birchard, for motion:

I. Assuming that section 19, article 1, of the constitution secured

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to Lane a jury of twelve to assess his damages, if he waived that right it was not error to assess the damages in any other manner. Not only might he have agreed to submit the damages to arbitration by three or five men, but he might, as in this case, agree to let the assessment be made by six men, selected, as required by the statute, in the probate court. *Flint River S. B. Co. v. Foster*, 5 Georgia, 194.

II. While the right is left to appeal to the court of common pleas, and get from that court any legal order, the preliminary proceedings, though they may clog, do not destroy the right of assessment, and do not render the law or the proceedings under it unconstitutional. *Flint River S. B. Co. v. Foster*, 5 Georgia, 194; 1 Binney, 416; 13 S. & R. 405; 2 Murph. 41; 1 Hawks, 482; 8 Yerg. 444; 4 Conn. 535; 4 Bibb, 416; 1 Marsh. 372.

III. Making the assumption before stated (No. 1), Lane might have had such a jury by appealing to the common pleas instead of the probate court, because the former is a court of record, known to the common law, and has power to make any order on appeal that justice requires—a *fortiori*, an order for assessment by a jury of twelve, if the constitution secures that.

IV. Lane, therefore, waived any such right to a jury of twelve by not appealing to the common pleas, and going into the probate court.

V. But section 19, article 1, does not require such a jury. (1.) The constitutional provision in section 5, that the right of trial by 171] *jury shall be inviolate, only means such right as was known to the law when this new constitution took effect. Then no common-law jury-trial was known in such a proceeding as this. (2.) If we look to the statute, we find that a jury of six was the only one then known for such a case. Act of March 25, 1851. (3.) Juries of six, before justices, etc., had been known for many years. That was the name given by statute, and by that name they were known by the people, and by the members of the convention which framed the constitution. (4.) Section 19, article 1, and section 5, article 13, taken together, show that those who framed the constitution did not regard the term "jury" as implying, in all cases, and *ex vi termini*, the number twelve. As used in article 13, "a jury of twelve men," by all rules of construction, implies, that as applicable to that class of cases, if the words "of twelve men" had not been used, six would have been sufficient, as it had been in other cases. *Expressio unius est exclusio alterius*.

VI. As applied then, to the assessing of damages for appropriating private property, in the exercise of the right of eminent domain, the term jury had just the meaning fixed by statute in such cases.

VII. If the question of constitutionality be in doubt, the law must be treated by courts as constitutional.

VIII. The court of common pleas should either have sent the case back, in order that further proceedings might be had, avoiding the error complained of, if existing, or should have regarded the case properly before it for the purpose of correcting that error; and should have proceeded to correct it by impaneling a proper jury of twelve. Secs. 511, 527, 531, of the Code.

Sutliff & Tuttle, against the motion :

I. Article 1, section 19, in providing that such compensation shall be assessed by a jury, "intends to *determine* and *define* the tribunal by *which the compensation shall be assessed." But that can [172 not be, unless the word "jury" is taken in some determinate and defined sense. And the signification of the term must have been fixed in one of two ways; by the definition of it in the constitution itself, or by its previous use.

II. The term, as defined in the constitution, is a body of "twelve men," acting in a court of record. Art. 13, sec. 5. The position most favorable to the plaintiff in error, therefore, is to say, that the term is not defined in the constitution, and use alone must be looked to for its signification.

III. In the statutes, the term has been used with vagueness as to the number of men. When the constitution was adopted, there were juries of twelve, of six, of five. Swan, old ed., tit. Sheriffs and Coroners. See also statutes as to apprenticeship, as to trials before justices, and as to occupying claimants.

IV. If the constitution uses the term jury according to this loose statutory use, nothing is defined or limited by it, and it affords no sort of guaranty for the right referred to.

V. But when the constitution was adopted, there was another use of the word "jury;" that, namely, in which, *ex vi termini*, without addition or explanation, it denoted the jury of twelve men. 2 Kent's Com. 13 (4 ed.), note. So entirely has the common-law use of the term been resorted to in construing the constitutional provisions for trial to jury, and settling their effect, that, in cases where a jury

was not given at common law, it is still held not to be given by this provision. But in all these cases where a body of men differently constituted, has been held to be lawful, it has been put upon the ground, not that such a body is a jury, but that in such cases a jury is not required, because not required at common law. *Will-yard v. Hamilton*, 7 Ohio (pt. 1), 111. Here, there is a use of the term, which would serve the purpose of the framers of the constitution, the limitation of the tribunal under consideration. No other supposable use does afford this limitation; the framers of the constitution *intended a limitation; consequently, they must have intended this use of the term, which alone would give that limitation.

VI. There are other principles of construction which give the same result, and require us to take the term as used in its higher and more important sense. Of these, *additio probat minoritatem*, is one.

VII. The argument is not legitimate, that at the time of the adoption of the constitution by the *people*, there was a statute providing for a body of six, called a jury, to assess damages in such cases. Act of March 25, 1854, Curw. 1672, sec. 2-4. The constitution had been entirely completed and signed fifteen days before the passage of this law. The language of the former is that of its framers only. Though submitted to the people, it derived its legal efficacy from the action of its framers only. See Old Cons., art. 7, sec. 5. They were not required even to submit the instrument to the people at all. Although they did so, yet its language was their own, used in the meaning of such language, when they selected it to express their ideas.

VIII. The decisions relating to the provisions in the old constitution, simply establish some of the common-law limitations of the right, and show that it did not extend to assessments of property taken for public use, tacitly admitting what would belong to such proceedings, if the right of such trial did extend to them. The present constitution extends the right to such cases; it is the same now, as if the right had existed at common law.

IX. The new constitution, adopted in view of those decisions, was designed to remove this evil. If the present law is constitutional, there is no alteration of the matter from what stood before. To submit the matter to a body of men constituted as the old committee was, to all substantial purposes, does not alter the matter,

although the triers be called committee in one law, and jury in another.

X. The case of *Work v. The State*, 2 Ohio St. 296, is referred to, and should determine this case also.

*XI. The common pleas has no jurisdiction of the question of [174 damages, unless it might take it contrary to the words of the statute, expressly declaring that the claim for damages shall go to the probate court. And to give the power in question to the court of common pleas, would be to vest it with a discretion as to the establishment of the road at the public expense, designed by the law to be exercised only by the commissioners.

XII. This view also applies to the refusal of the court of common pleas, on error, to retain the case for further proceedings.

XIII. But no such jurisdiction as that last referred to is given to the common pleas, except in the single instance of proceedings certified from before a justice. Sections 532, 526, of the code, relate to the district and Supreme Court only, and require the proceedings to be sent back for trial.

XIV. There was no waiver. Consent can confer no judicial power. But the motion on the part of Lane was a merely compulsory act.

THURMAN, C. J. The questions presented by this record have been very fully and ably argued by counsel, in order that they might be decided upon this application, the applicants not wishing leave to file their petition unless the court, upon mature consideration, should be of opinion that the judgment complained of ought to be reversed. It is not our practice to hear fully, upon a mere motion to file a petition in error, since we do not require to be convinced that a judgment is erroneous before granting such leave. It is sufficient that we doubt its correctness, or that the question is one which, though not difficult, is yet of such general importance, that it ought to be decided by the court of the last resort, and reported. But where, as in this instance, the questions are of unusual gravity, and their decision at an early day is highly desirable, we do not hesitate to depart from our usual practice, and consider them as fully, upon a mere motion for leave to file a petition, as we would upon the petition if filed.

*It was not pretended in the court below, nor is it now [175 pretended, that the provisions of the statute in respect to the lay-
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ing out of roads, were not complied with in this case. But the objection made, is, that when these proceedings took place, there was no law providing for such a jury to assess Lane's damages, as he had a right under the constitution to demand, and that, consequently, the attempt to appropriate his land was unconstitutional.

That private property shall not be taken for public use without compensation in money being made to the owner, and that "such compensation shall be assessed by a jury," are express provisions of the constitution (art. 1, sec. 19); and that no valid appropriation can be made without a law providing such compensation, is a fundamental principle often asserted, and nowhere more strongly than in this state. "Before the owner can, without his consent, be deprived of his land, for the public use, the legislature must declare by law that the public welfare requires it, direct the mode of ascertaining its value, and provide for its payment," was the language of the court, in *McArthur v. Kelley*, 5 Ohio, 143. "Unless the law, by which the defendant's property is taken for a public use, provides him a compensation, it is void," said Chief Justice Lane, delivering the judgment of the court, in *Foote v. Cincinnati*, 11 Ohio, 410.

That where the constitution prescribes the mode of assessment, that mode must be pursued; and that the constitution, in the particular case under consideration, does not execute itself, but that provision must be made *by law* for the selection, etc., of a jury, are propositions sufficiently obvious and not denied.

This brings us to the questions involved in this case, to wit:

1. Does the provision in article 1, section 19, of the constitution, for an assessment of compensation by a jury, apply where property is taken to make or repair roads, which are to be open to the public without charge?

2. Does the term "jury," in that section, mean a jury of twelve?
176] *3. If it does, had the law provided such a jury when Lane's land was taken?

4. Did he waive his right to an assessment by such a jury?

The constitutional provision is in these words:

"Art. 1, sec. 19. Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases, where private prop-

erty shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for the benefits to any property of the owner."

In *Stemble v. Hewling & Hancock*, 2 Ohio St. 228, it was very elaborately argued, that this provision for a jury relates only to cases falling under the latter clause of the section, and that consequently in the cases specified in the first clause, of property taken for purposes of war or for public roads, a jury assessment is not necessary. In respect to these, it was said that the constitution is not different from that of 1802, under which it was uniformly held that the damages might be assessed by a commission. *Willyard v. Hamilton*, 7 Ohio (pt. 2), 111.

For reasons stated in the judgment delivered, we then expressed no opinion upon this question; but we have now considered it, with the aid of the arguments referred to, and are unanimously and clearly of the opinion, that both the jury provision and that forbidding a deduction of benefits, do apply to all the cases named in the section. There is nothing in the grammatical construction of the section, nor anything in reason or justice, that requires a more limited application; and it is certainly forbidden by a consideration of the old law, and the *evil which it is fair to presume the con- [177] stitution was intended to remedy. In regard to this last consideration, see the remarks of Judge Ranney, in *Work's case*, 2 Ohio St. 307.

That the term "jury," without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be. *Work's Case*, and *Willyard v. Hamilton*, *supra*. That it is used in this sense wherever it occurs in the constitution, except in the section under consideration, is admitted by counsel, and could not be successfully denied. Unless, then, we are prepared to assert, that the same word means one thing in one part of the constitution, and another thing in other parts of it; that in some places it has a definite legal signification, but that in another it defines nothing with certainty, we must give to it, wherever it occurs, its ordinary common-law import. Now, is it reasonable to suppose that the framers of the constitution used the word in an indefinite and doubtful sense, and that, while carefully protecting the right of property, by adding to the pre-existing safe-guards the additional one of a jury trial, they left it to the legislature to con-

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stitute the jury of any number, however small? For, if it may consist of six, as prescribed in the statute before us, for the same reason it may consist of three, or two, or even one, if the assembly see fit to declare so. And, as was well observed in Work's case, "it is no answer to say, that this would not likely be done. If it had been deemed safe to leave it to the discretion of the general assembly, no constitutional provision was needed; but whether needed or not, it has been ordained by a power, which both the general assembly and this court are bound to obey."

Nor can it be said that the constitution means to give a jury of twelve only where the common law gives it; for where a right of way is appropriated for the use of a corporation, it is expressly declared (art. 13, sec. 5), that the compensation to the owner shall be ascertained by a jury of twelve men, in a court of record. The 178] spirit of the constitution is thus manifest, *for there is no reason why a jury of twelve, in a court of record, should be the proper tribunal when property is taken for a corporation, and some inferior tribunal be deemed sufficient when it is taken in the name of the state. It is only by an exercise of *her* right of eminent domain that it can be taken at all; and a corporation, when appropriating it, is nothing more, in principle, than her agent or instrument. 1 Ohio St. 95. However taken, it must be for a public use; for no corporation can take it for a mere private use unconnected with any public purpose. *Ib.*

And here I may observe, that the constitutional provision last cited, affords an answer to the argument *ab inconvenienti*, that has been urged upon us; for there is no more difficulty in assessing the damages by a jury of twelve, in a court of justice, when property is taken for the state, than there is when it is taken for a corporation.

It also furnishes an answer to what has been said of the use of the word "jury" in divers statutes, to designate bodies of men composed of a less number than twelve; as justices' juries, sheriffs' and coroners', and apprentices', etc.; for, by requiring twelve men sitting in a court of record, it shows that no smaller tribunal was contemplated for cases of condemnation. And in this connection it may be well to remark, that the act of March 25, 1851 (2 Curwen, 1672), which provided a jury of six to assess damages in road cases, was not enacted until after the constitution was framed and

the convention had adjourned. Of course, it throws no light upon the purpose of the convention.

It is true that the counsel for the applicants draws a very different inference from article 13, section 5, and argues that the specification of the number twelve in this section, affords an implication that that number is not required by section 19 of article 1, in which the number is not expressly stated. "*Expressio unius est exclusio alterius*," is the argument.

But in addition to what has already been said militating *against this view, it is to be borne in mind that the above [179 maxim is by no means of indiscriminate application, and that it would be especially dangerous to rely very strongly upon it in construing the constitution, the different articles of which were drafted by different committees, who, however they might concur in a common purpose, would not be very likely to employ precisely the same language to accomplish it. The committee that drafted the bill of rights (art. 1) saw no necessity to define the word "jury," for they apprehended no disregard of the ordinary legal signification of the term: the committee that prepared the article on corporations were apparently less confident, or were of a more cautious temper, and they did define it.

It was in view of these and the other considerations that bear upon the question, that this court arrived at the conclusion, in Work's case, to which we still adhere, that "if any inference is to be drawn from specifying the number of the jury [in art. 13], it is very strong evidence of the sense of the convention, that that was what had already been secured by the other sections, to suitors in other cases." 2 Ohio St. 307, 308.

And we agree with Grimke, J., in Willyard v. Hamilton, that a jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court, that a presiding law tribunal is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference, that a mere commission, though composed of twelve men, can never be properly regarded as a jury.

Upon the whole, after a careful examination of the subject, we are clearly of the opinion, that the word "jury," in section 19 of article 1, as well as in the other places in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties.

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It is hardly necessary to add, that they may be sent to inspect the premises. That may be done in the trial of even a common-law [180] action, when it is expedient. It is done, *under the act regulating the appropriation of property by corporations; an act, I may remark, in passing, that shows how easy it is to comply with the requirements of the constitution upon the subject we are considering.

Before leaving this part of the case, I would observe, to prevent misapprehension, that we entertain no doubt of the validity of an enactment that requires an assessment of the damages, in the first instance, by a commission—as, for example, the viewers of a road—provided a right of appeal is given to a court in which they may be assessed by a constitutional jury. For the same reason that a cause may be tried by a justice of the peace, without a violation of the constitutional provision securing the right of trial by jury, provided such trial by jury can be obtained by an appeal, there may be an assessment by the viewers of a road or other commission, if an appeal and proper jury trial be allowed.

The next inquiry is, whether, when Lane's property was taken, there was any law providing a proper jury to assess his damages. And we are clearly of the opinion there was not. The statute required them to be assessed, in the first instance, by the viewers, which was well enough. From their decision, when confirmed by the county commissioners, an appeal was given to the probate court in respect to the damages, and to the court of common pleas in respect to the order establishing the road. With the policy of thus dividing the proceeding into two parts, and sending one part to one forum, and the other to another, we have nothing to do. It is sufficient that each court was competent to receive the jurisdiction conferred upon it; but the fatal difficulty is, that a jury of six was prescribed for the case in the probate court; and as to the common pleas, no jurisdiction over the question of damages was given to it.

It is argued, indeed, that the common pleas, after the reversal of the order of the county commissioners, might have set the matter [181] down for further proceedings in that court, and caused an *assessment by a jury of twelve to be made. But the statute gave no such authority, and to have done so, would have been to usurp a jurisdiction not conferred, by supplying an omission in legislation.

The last point made is, that Lane waived his right to a jury trial.

We see no waiver in the case. For my own part, I do not clearly

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perceive how a man can be said to waive a thing which he can not have, let him demand it ever so stoutly. Had Lane required an assessment by a jury of twelve, his demand would have been fruitless, for there was no law to impanel such a jury. How, then, can he be said to have waived it? But, apart from this consideration, what evidence of waiver is there? It is answered, that he did not appeal to the common law, from the order establishing the road, and he did appeal to the probate court, in respect to the damages.

This is all very true, but what does it amount to? Simply to this, that he sought to get the damages to which he thought himself entitled, and, failing, refused to accept the amount assessed. Had he accepted that amount, there would be room to talk about a waiver. As it is, there is none. He was no volunteer, coming into court without being called, and selecting his own forum. On the contrary, he was on the defensive all the time. The public were trying to take his land, and he was resisting the attempt until he should be paid to his satisfaction, or the amount of his damages be ascertained in a constitutional mode.

It follows, from these views, that there is no error in the action of the common pleas, and leave to file a petition in error is therefore refused.

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Where A is entitled to a conveyance of land from B, and A has agreed to convey the same land to C, upon the performance, on the part of C, of certain conditions, and it is agreed between A and C, that the deed shall be executed by B to C and deposited with a third person, to be delivered to C upon his performance of the conditions of sale; and the deed is accordingly executed and left with such third person, who afterward delivers the deed to C without the performance of such condition, no title passes to C by such delivery.

Where the condition upon which the deed was to be delivered, was in substance, among other things, that C was to execute a mortgage upon the premises to be conveyed, to secure the payment of money for A to a third person, and a bill is filed by A for a specific performance of the agreement, a court of equity will compel the execution of the mortgage, or if the money thus secured to be paid is due, will decree the same a lien upon the land, and direct

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a sale of the interest of A and C in the land, to pay the amount which was to be secured by the mortgage.

Where C, after procuring the deed out of the hands of the person who held the same as an escrow, by unfair means, makes a mortgage on the same to a stranger, such stranger acquires no lien on the land which can be prior to the lien for the money which C was, by mortgage, to secure to A before he was entitled to the possession of the deed.

In chancery, reserved in Seneca county.

The case is stated in the opinion of the court.

Gibson & Tunison, for complainants:

The deed was never delivered; in the hands of Gilbert M. Ogden it was an escrow; and, obtained without the performance of conditions which were to precede its delivery, it passed no title. 4 Kent, 454; 2 Johns. 248; 21 Wend. 267; 20 Ib. 49; 12 Ib. 647; 6 Ib. 666. The actual *date* of a deed is its delivery, and a deed delivered as an escrow takes effect only when the conditions are fulfilled. Lessee 183] of *Shirley v. Ayres*, 14 Ohio, *207; *Jackson v. Dunlap*, 1 Johns. Ch. 114; *Shoemaker v. Osterholt*, 3 Hill, 513; *Jackson v. Phillips*, 12 Johns. 413; *Beekman v. Foust et al.*, 18 Ib. 543; *Murray v. Stair*, 2 Wend.; Black. 307, note 20; *Clark v. Gifford*, 10 Wend. 311; *Hatch v. Hatch*, 9 Mass. 210; 12 Com. Law, 351; 4 Cruise, 34, 35; 7 Ohio (pt. 2), 50; 2 Story Eq. Jur., sec. 1020; *Taylor's Law Glossary*, 123; *Webster's Dic.*, tit. Escrow. *McMillen* having obtained the deed by fraud, no title passed to *Watson* or *Stroh*. As the complainant held the title-bond of *Myers*, and as the latter was only bound to make a deed to the holder of that bond, it can not be contended that the deed was delivered by *Myers* to *McMillen*. *Myers* was bound to convey to complainant, or his assigns. The bond was never assigned to *McMillen*; and before its transfer, *McMillen* was bound to perform certain things, which he never has performed. A delivery of the deed by *Myers* to *McMillen*, would have been of no effect. The deed was made, as the testimony shows, to save expense, and was held as an escrow, to secure the performance of certain things by *McMillen*.

Pennington & Lee, for *Watson*; *W. O. & H. Noble*, for *Stroh*:

If there was any real question between G. M. O. and the other respondents, he should have made the issue by cross-bill, or made his answer such. As it now stands, his answer, without verification,

could affect no one in the case; and his deposition, taken by the complainant, as to questions entirely foreign to the issue between them, can not affect the other respondents; but if this deposition contained evidence pertinent to any issue between the complainant and Watson and Stroh, or either of them, it would be different. The bill should be dismissed as to respondents, Watson and Stroh.

At the time of the exchange of lots between complainant and McMillen, G. M. O. held a purchase-money lien on lot 227, *sub- [184] sequently reduced to \$230. This lien was waived by the agreement of G. M. O. with complainant and McMillen, to take the latter for the amount, to be secured by mortgage on lot 193, which McMillen subsequently gave. A deed was deposited with G. M. O., for his indemnity, which afterward he voluntarily delivered up. For this act complainant is not responsible, and he has a right to conveyance of the lot, free from all question as to purchase-money lien, so far as the sum of \$230 is concerned. If this lien is then waived or lost, so far as complainant is concerned, it is lost forever, and the lot entirely relieved from it.

G. M. Ogden has no lien upon lot 193. He never was owner, and can have no purchase-money lien. The lien by deposit of title, papers attaches in some of the states, and is termed an equitable mortgage. Yet, even if this kind of lien were known to the laws of this state, G. M. O. could have, by the deposit made with him, no lien prior to Watson & Stroh—such liens not taking priority over subsequent mortgages without notice, and where mortgages have been duly recorded. 2 Story's Eq., sec. 1020. Nor has the complainant any lien on this lot. G. M. Ogden must abide his contract, and look to McMillen alone to discharge the debt of \$230. The complainant can in no way be charged with, or compelled to pay it. He could not claim it from McMillen, and therefore could not hold a lien for it upon lot 193. But, on the other hand, the complainant was to discharge the lien of \$110 to Young upon lot 193, which is long past due, and remains unpaid. In this, complainant has failed to complete his own contract with McMillen—has failed to do equity, on his own part, in the outset.

The law defines an escrow to be, where a man makes a deed, or written obligation, and delivers it to a stranger to hold till certain conditions are performed by the grantee, and then to be delivered to him, to take effect as his deed. It is essential that the delivery be made to a stranger and not to the *party*; for if delivered to the

185] *partg*, let the words be what they may, the delivery *is absolute; the deed shall take effect at once, and the party is not bound to perform the condition. When such deposit is made, it is important that the terms and conditions of it should be clearly expressed, and that it should be declared to be deposited or delivered as an *escrow*; for if the grantor delivered the deed as his, to a stranger, to be delivered to him to whom it is made, on the performance of certain conditions, it will take effect at once. *Wheelright v. Wheelright*, 2 Mass. 446; *Fairbanks v. Metcalf*, 8 Mass. 230; *Hatch v. Hatch*, 9 Ib. 293; *Ruggles v. Lawson*, 13 Johns. 285; *James v. Vanderheyden*, 1 Paige 385; *Foster v. Mansfield*, 3 Metcalf, 412; 4 Pick. 518. But here the grantor, Myers, had nothing whatever to do with the arrangement under which G. M. O. took the deed, supposing it to have been made as stated by G. M. O., but knowing nothing about it; made no condition at the time of the delivery of the deed, either to McMillen or complainant; and to one or the other of these persons, he (Myers) must have delivered the deed. If to McM., the delivery was complete, and the title perfected in McM. If to complainant, to be delivered to G. M. O., upon some other arrangement between the two Ogdens and McM., in which the grantor (Myers) had no concern, imposing no condition whatever before delivery, then it is clear that the deed was not an *escrow* in the hands of complainant, nor could become so in the hands of G. M. Ogden, because Myers was not a party to any such delivery to G. M. Ogden; therefore, the title, in this view of the case, at once vested in McMillen; and if he had conveyed the premises to a third person in good faith, even while the deed was in the hands of G. M. Ogden, such conveyance would have been complete and valid.

But even if this deed was not legally delivered, and if McMillen, therefore, had not the legal title in lot 193 at the time he made the mortgages to Watson and Stroh, it does not necessarily follow that these mortgages were void and should be canceled. McM. had an 186] equitable interest in the lot at least, and which, of *course, would be covered by these mortgages. Myers had been fully paid for the lot, and if the legal title still remains in him, it is merely nominal. Neither G. M. O. nor the complainant can claim that the legal title to this lot is in either of them by the operation of this *escrow*; if not in either of them, it must be in Myers or McM.; if in either of the latter, the mortgages are sustained, and the real ques

tion is as to the priority of liens; and G. M. O., having no lien at all, must be postponed until he gets his claim in a different shape. His being the depositary of an escrow, gives him no lien or claim at all upon this lot. It is not claimed or pretended that lot 193 is insufficient to pay Watson, Stroh, and G. M. Ogden the full amount of their respective claims. The lot, then, being ample to pay all these claims, and G. M. O. having a mortgage on it, made pursuant to the contract under which the deed was deposited with him, he must pursue his claim under this mortgage, and in no other way, so far as he may take steps to make his money out of lot 193.

KENNON, J. In the fall of the year 1851, David D. Ogden was the equitable owner of lot No. 193, in the town of Republic, Seneca county, Ohio—upon which Jacob Young held a lien, by mortgage, for about \$110, with interest. The naked legal title was in a man by the name of Christian Myers, who was bound to convey to David D. Ogden, the complainant, and was ready and willing to do so.

Gilbert M. Ogden had been the owner of lot No. 227, in the same town, and by a written agreement had agreed to convey the same to William McMillen, upon the payment to him by McMillen of the sum of \$850. McMillen had paid to Gilbert M. Ogden \$200, leaving a balance still due of about \$650.

An agreement was entered into between David D. Ogden and McMillen, by which David D. Ogden was to pay the hundred and ten dollars due to Jacob Young, and \$400 of the \$650 due to Gilbert M. Ogden; and McMillen was to assign to David D. Ogden [187 the title-bond for lot No. 227, on Gilbert M. Ogden, so that upon payment of the purchase money to Gilbert M. Ogden, David might procure the title to lot 227 directly from Gilbert M. Ogden, in whom the legal title was then vested.

McMillen was to pay the balance of the purchase money due to Gilbert M. Ogden on lot No. 227, being about \$250. It was further agreed between David D. Ogden and McMillen, that David D. Ogden should procure the title to lot No. 193, to be made by Christian Myers to McMillen, and that McMillen should execute a mortgage on lot No. 193 to Gilbert M. Ogden, to secure the balance of the purchase money of \$250 to Gilbert M., on lot No. 227.

David D. paid to Gilbert M. the \$400 which he was bound to pay, or at least secured the payment of the same to the satisfaction of Gilbert. He also procured Christian Myers to execute a deed, and

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acknowledge the same, purporting to convey to McMillen lot No. 193. This deed was not delivered to McMillen, but to David D. Ogden, who, with McMillen's assent, delivered the same to Gilbert M. Ogden, to be by him delivered to McMillen, upon McMillen securing to Gilbert, by mortgage on lot No. 193, the balance due Gilbert on lot No. 227, being the two hundred and fifty dollars which McMillen had bound himself to David D. to pay to Gilbert M.

About the month of March, 1852, McMillen, under pretense of procuring a description of lot No. 193, procured from Gilbert M. Ogden the deed thus deposited with him by David D. Ogden, without previously having assigned and delivered to Gilbert the title bond, which he had executed to McMillen, or having executed to Gilbert a note or mortgage for the balance of the purchase money due Gilbert. McMillen having thus procured possession of the deed made by Myers, and purporting to convey to McMillen lot No. 193, executed two mortgages on the lot, one to secure to a man by the name of Watson, a debt of between one and two hundred dollars, and 188] one to secure to John Stroh a debt of *between two and three hundred dollars; and afterward executed a note to Gilbert M. Ogden for the \$250, payable one year after date, and executed a mortgage to secure this last note, and caused the same to be delivered to him as he, McMillen, was about to leave in the cars for California; but this note and mortgage were not accepted by Gilbert M. Ogden as satisfactory. The other two mortgages were duly received.

McMillen did not assign or deliver to Gilbert, for David D. Ogden, the title bond.

The bill in this case was filed by David D. Ogden, substantially stating the above facts, and further, that Watson and Stroh combined with McMillen to cheat and defraud the complainant. The bill prays that the lien of the complainant, for the payment of the \$250 may be held to be the first and best lien after Young's mortgage, that the deed to McMillen may be set aside, as well as the mortgages of Watson and Stroh, that Gilbert may be compelled to convey lot No. 227 to complainant, and for general relief.

Watson, Stroh, Young, and Gilbert M. Ogden, answer; replications are filed to the answers of Watson and Stroh, and the bill as to McMillen is taken *pro confesso*. The deposition of Gilbert M. Ogden is taken, and there is no other evidence except some written contracts.

If we look to the written contracts between David D. Ogden and

McMillen, they seem to be little else than title bonds, by which David agrees to convey to McMillen lot No. 193, on or before the first day of November, 1851, in consideration of four hundred and fifty dollars paid; said lot being a part payment for lot No. 227. And McMillen by a like instrument binds himself to convey to David D. Ogden, lot No. 227, on or before the same day, November, 1851, upon a conveyance being made to McMillen of lot No. 193, and a payment of \$400 being made to Gilbert M. Ogden on account of the purchase by McMillen from Gilbert.

Neither of these contracts is under seal, nor *does either [189 of them mention the fact that David D. Ogden is to pay the mortgage of \$110 on lot No. 193, nor the fact that McMillen is to pay the balance due Gilbert M. Ogden of \$250 or \$230, nor that Meyers is to make a deed direct to McMillen for lot No. 193, and that Gilbert M. Ogden, after being paid the balance of his purchase, is to make a deed to David for lot No. 227. Still, inasmuch as each bound himself to make a warranty deed to the other, the effect would be that each would have to answer to the other for any damages he might sustain by reason of the respective liens on the lots; and we have come to the conclusion, from the facts in the case and the testimony of Gilbert M. Ogden, that a parol contract did exist between David D. Ogden and McMillen, that McMillen was to assign the contract which he had with Gilbert M. for lot 227, and pay the balance due Gilbert of either \$230 or \$250, and secure the same to satisfaction of Gilbert on lot No. 193, by a mortgage executed at the same time of the delivery of the deed from Myers to McMillen, and which mortgage was to have the *first* lien on McMillen's title to that lot, and that a deed was to be made by Gilbert to David D. Ogden on receipt of the purchase money. That although McMillen and David Ogden each agreed to make to the other a deed with clauses of warranty, yet, by a subsequent parol agreement, neither was to make the deed in fact, but to procure the same to be made, and to remove certain liens on the same.

Gilbert M. Ogden says, in his deposition, that "in the winter of 1852, David D. Ogden and William F. McMillen came to me, and they then said to me that they had traded lots, and that David D. Ogden was to pay me four hundred dollars, for which David gave me his note; and it was then understood by myself, McMillen, and D. D. Ogden that I should retain possession of a certain deed which he, the said D. D. Ogden, handed me, which deed was executed by

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one Christian Myers and wife, which deed, with covenants of general warranty, conveyed to the said McMillen lot No. 193 in the town of 190] Republic; which said deed I was to *keep possession of until said McMillin should deliver to me a certain title bond which I had given to said McMillen, conditioned that I was to execute unto him a deed for inlot No. 227, which bond was to be assigned by said McMillen to David D. Ogden, so that I could make a deed to D. D. Ogden; and the said McMillen was further to secure me the amount which he still owed me, the same being the residue of the purchase money for said lot No. 227, which amount was \$230, to which amount was added \$20 of other indebtedness, making \$250, which the said McMillen agreed to secure by giving me a note and mortgage on lot No. 193. That after he (McMillen) had executed said note and mortgage, and delivered up and transferred said title bond as aforesaid, I was to deliver to said McMillen the said deed from the said Myers, which, by the terms of the agreement, as before stated, had been deposited with me by the said David D. Ogden."

Taking this testimony of Gilbert M. Ogden as true—and we have no reason to doubt its truth—the deed executed by Myers and wife was deposited with the witness, to be delivered to McMillen upon the performance, on his part, of two conditions: 1. He was to assign to David D. Ogden the bond of Gilbert M. Ogden, and deliver the same to Gilbert. 2. He was to execute a note to Gilbert for the residue of the purchase money due on lot No. 227, and secure the payment thereof by a mortgage on lot No. 193. McMillen, to say the least of it, procured the possession of this deed without complying with either of these conditions, and immediately thereafter incumbered, so far as he could, the lot upon which the residue of the purchase money for lot 227 was to be secured.

The express parol agreement between McMillen and David D. Ogden was that McMillen was, by mortgage on lot No. 193, to secure to Gilbert M. Ogden \$250, of which sum \$230 was the residue of the purchase money due Gilbert M., without the payment 191] *of which Gilbert could not be compelled to make a deed to David—the payment or security for the payment of which was for the benefit of David, without which he could not procure his title. David had already satisfied Gilbert for \$400 of the purchase money. And, although this was a parol contract, yet, as between David and McMillen or other persons, we know of no reason why a court of equity would not compel a specific performance of the agreement,

where, as in this case, the statute of frauds is not interposed by plea or answer. If a bill had been filed against McMillen alone by David D. Ogden, to compel him to execute such an agreement, and McMillen had not claimed the benefit of the statute of frauds, a court of equity would have decreed a specific performance of the contract.

There is nothing to prevent such a decree in this case, unless it be true that Watson and Stroh are *bona fide* purchasers without notice, and unless it be also true that McMillen acquired title to lot No. 193, so as to be able to convey the same by mortgage to them.

It is claimed by the complainant, that the deed executed by Myers to McMillen, was delivered to Gilbert M. Ogden as an escrow, to be by him delivered to McMillen, upon certain conditions to be performed by McMillen, and that, until the performance of such conditions, no delivery could be made by Gilbert, nor could any title pass to McMillen. That such was the intention of the parties, we have no doubt. On the other side, it claimed that David D. Ogden was a stranger to the deed, and that he had no power to deliver the deed, as an escrow, to Gilbert. That upon the execution of the deed by Myers, the title immediately passed to McMillen; that this deposit of the deed by David D. with Gilbert M., was not made pursuant to the law of escrow; that to constitute a good escrow, the deed must be delivered by the *grantor* to a *stranger*, to be by him delivered to the *grantee*, upon the performance of some condition in which the *grantor* had an interest, over which he had control, or which he *had the right to direct; that, [192 the law defines an escrow to be, where a man makes a deed, or written instrument, and delivers it to a stranger, to hold till certain conditions are performed by the *grantee*, and then to be delivered to him, to take effect as his deed; that it is essential that the delivery be made to a stranger, and not to the party.

It is claimed that the grantor (Myers) had nothing whatever to do with the delivery, in this case, to Gilbert M. Ogden, and knew nothing about it, and, therefore, Gilbert could not hold the deed as an escrow.

In the first place, it may be observed that Myers, the grantor in the deed, at the time of its execution had no interest in the lot whatever, except as naked trustee. David D. Ogden had all the beneficial interest in the lot, and Myers was willing, in discharge

of his obligation to David D., either to execute a deed to David D., or to McMillen. A conveyance by Myers to McMillen, with knowledge of David D. Ogden's interest, would have conveyed to McMillen nothing but the naked legal title. The whole beneficial interest in the lot would still have remained in David D. Ogden. It was this beneficial interest, as well as the legal title, which David had contracted to convey, and which McMillen had contracted to receive. The only interest in the lot which was worth having, was the interest held by David D. Ogden, and which could pass to McMillen by the consent of David D. only. Myers, without the consent of David, had no power to convey this equitable interest to McMillen. It was David alone who had the control of this interest. He might consent to the unconditional transfer of the legal and equitable interest, or he might refuse to consent to the conveyance of his own interest. David D. was, therefore, in equity and in substance, the *grantor* in the deed, and Myers the mere instrument through whom the conveyance was to be perfected. David D. was not, therefore, a mere stranger to this conveyance; and if he chose to annex a condition to the delivery of the deed, viz., that [193] it should be delivered to a third *person, to be delivered to McMillen upon the performance of certain conditions, he had a perfect right to do so; at least, with the assent of Myers. And, in this case, we would have no hesitation in finding, under the circumstances, that Myers himself, at the request of David, caused this deed to be delivered as an escrow, if it were necessary to find such fact: for it is very evident that Myers made the deed at the request of David D. Ogden, and would attach just such conditions to the delivery as David D. might direct.

The testimony shows, that the deed was in the possession of David D., and not of McMillen, when delivered to Gilbert, as an escrow. This delivery may well be considered the delivery of Myers, the nominal *grantor*, through his agent, David D. Ogden, to Gilbert M. Ogden, a stranger, and upon condition; and therefore coming within the definition of an escrow. But we do not deem this necessary. We think that David D., being the real owner of the lot, might procure a deed from the trustee, to be executed to any person, have the same delivered to himself, and that he (David) might attach any conditions he might see proper, before he delivered the deed to the nominal grantee. To take the other view of this question, and held that, upon execution of the deed by Myers

and delivery to David D. Ogden, the title passed to McMillen, would, in our opinion, be to lose sight of the substance of this whole transaction, and vest title in McMillen, against the consent of the holder of the legal title, the holder of the equitable interest, and very much to the surprise of the grantee himself, who never calculated on any such result.

It is however further claimed by Watson and Stroh, that they are *bona fide* mortgagees, for a valuable consideration, without any knowledge of the agreement between McMillen and David D. Ogden; and that, therefore, they can not be prejudiced by the deed having been delivered to McMillen by Gilbert M. Ogden, without McMillen's compliance with the conditions upon which a delivery was to be made to him.

*A deed takes effect from delivery; without delivery it is [194 not a deed. The deed executed by Myers, could not be delivered by Gilbert M. Ogden, or any other person with whom the same might have been deposited as an escrow, until the conditions upon which the delivery was to take place, had been complied with by McMillen. McMillen did not comply with either of the conditions required of him, before he obtained possession of the deed. These conditions were annexed for the benefit of David D. Ogden: one of which was, an assignment to David of Gilbert's title bond to McMillen, for lot No. 227; and the other was, that he should secure by mortgage on lot No. 193, the payment to Gilbert of the balance of the purchase money, so that David would have a right to obtain from Gilbert a clear title to lot No. 227. Without the payment of this balance, David was not entitled to a deed for the lot. McMillen did neither of these things, but as we read the testimony, he obtained the deed for the purpose of getting a *description* of the property, that he might execute the mortgage to Gilbert. The deed was neither *delivered*, nor *intended* to be delivered, by Gilbert to McMillen; and, therefore, as between Myers and David D. Ogden on the one part, and McMillen on the other, no title, either legal or equitable, to lot No. 193, passed to McMillen. And assuming the fact to be, as we find it to be, that these conditions to be performed by McMillen were for the benefit of David D. Ogden, and not Gilbert, McMillen, as against David, would have acquired no title to the lot, even if Gilbert had actually delivered the deed, intending thereby to pass the title to McMillen.

Gilbert M. was clothed with a special authority, and that known

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to McMillen, by which he could not deliver the deed, until the conditions on which it was to be delivered were complied with.

But admitting all this to be true, it is still claimed, and with reason too, that if David reposed confidence in Gilbert, and he violated that confidence and delivered the deed, and loss is to fall on 195] *either David or the mortgagees, that David should sustain that loss, and not the innocent mortgagees. This position can not be denied, if fault is to be attributed either to David or to his agent, Gilbert, by which the mortgagees were misled to their injury.

There is a class of cases, however, to which this doctrine does not apply. A loans his horse to B, and B sells to C; A may recover the horse from C, although A reposed confidence in B, by which he obtained possession of the horse, and thereby enabled him to hold himself out as the owner of the horse.

In this country no one can obtain title to stolen property—money and bank notes possibly excepted—however innocent he may have been in the purchase; public policy forbids the acquisition of title through the thief.

So also, we apprehend, if one forges a deed for another's property and puts it upon record, he neither acquires nor has power to convey any title to such property. The original fraud so taints the transaction that a *bona fide* purchaser from such source could claim as against the real owner, no title whatever to the property.

So, if one intending to convey his land to another, upon being paid for the same, executes in due form of law a deed for the land, the grantee pays nothing, but steals from or robs the grantor of the deed, and puts it upon record, and makes sale to a stranger, who *bona fide* for a valuable consideration purchases the same, such stranger would acquire no title whatever to the land.

If the owner of land makes a deed purporting to convey his land to any one, and such person, by *fraud or otherwise*, procures the owner to *deliver* the deed to him, a *bona fide* purchaser from such fraudulent grantee, without notice of the fraud, might acquire title to the land. But if the deed never was in fact either delivered or intended to be delivered by the grantee, or his agent, and the named 196] grantee surreptitiously obtained *mere possession* *of the deed, a *bona fide* purchaser from such holder of the deed, would no more acquire title thereby than if the grantee had stolen the deed from the grantor's possession; such deed would be no more the deed of

the grantor than if it had been a forgery. It wanted that which is essential to any deed, as essential as the signing of the deed, viz., a delivery.

In this case, as we understand the testimony, this deed was neither delivered, nor intended to be delivered. And we hold that neither McMillen nor his grantees or mortgagees obtained any title to lot No. 193; that the whole beneficial interest in the lot is still in David D. Ogden.

This beneficial or equitable interest in this lot thus belonging to D. D. Ogden, he never agreed to convey to McMillen, until McMillen created a lien thereon, to secure the payment for the benefit of David D. of the balance due to Gilbert M., and if instead of Myers conveying to McMillen he had conveyed to D. Ogden, Ogden, by his agreement, was bound to convey to McMillen the lot, subject to the payment of the balance of the purchase money on the other lot. David D. Ogden had precisely the same equity to have the purchase money paid on lot No. 227, as he would have had if he had agreed to sell to McMillen lot No. 193, and McMillen had agreed to secure the balance of the purchase money on the same, being the sum of \$250. These \$250 are in fact a part of the consideration which McMillen agreed for the conveyance to him of lot No. 193, to pay for D. D. Ogden's benefit to Gilbert M., to enable David to get a title for the lot No. 227.

After a full examination of the arguments made and authorities cited by defendants, Watson and Stroh, we are of opinion that David D. Ogden is entitled, by his contract, to have the balance of the purchase money due Gilbert M. Ogden paid by McMillen, and that, after the mortgage of Young, David is entitled to have the first lien on lot No. 193, for that purpose, whether that lien shall be in the name of Gilbert or David. That, *as the money is now [197 due, the lien will be enforced by decree instead of mortgage.

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J. D. being indebted to T. for the purchase money of certain real estate, gave him several notes and a mortgage upon the property to secure them. Soon after the execution of the mortgage, J. D. conveyed the land, subject thereto, to other persons. After some of the notes had fallen due, T. recovered a judgment at law upon them against J. D.; and, in ignorance of the conveyance, levied upon, bid off, and took a deed of the mortgaged premises, in satisfaction of the judgment. Upon a bill filed upon the mortgage, by the assignee of T. against J. D. and his grantees:

Held, That the sale of the property upon the judgment at law was no defense of this suit, and did not operate as a payment of any part of the debt secured by the mortgage.

That whether a court of equity has, or has not, the power to vacate the satisfaction of a judgment, and open it for further process, because the purchaser, under a mistake, bid off property to which the debtor had no title, it will not permit such a sale to prejudice a party, in a case over which it has unquestioned jurisdiction..

That the mortgage gave such jurisdiction in this case, and nothing short of an actual satisfaction would operate to deprive the mortgagee of his estate in the property, or bar a suit to recover the money secured by the mortgage.

The cases of *Vattier v. Lytle*, 6 Ohio, 477, and *Freeman v. Caldwell*, 10 Watts, 9, commented upon and distinguished.

IN CHANCERY; reserved in Licking county.

The case is as follows:

On the 4th of February, 1839, Abraham Wright was the owner of one undivided third of a tract of 1,300 acres of land, the remaining undivided two-thirds being owned by Joseph Taggart, in his own right and as trustee of Edward Gray and Robert Taylor; and Joseph 198] Taggart was also, as above, the owner of the *undivided two-thirds of two other tracts, one of one hundred and thirty-two, and the other of one hundred and thirty-seven acres. On that day Wright filed his petition for partition as to the 1,300 acres, against Taggart, Gray, and Taylor, and 411 acres were set off for him.

On the 11th of March, 1839, Taggart conveyed the undivided two-thirds of all the above-named tracts to John Dillon, Dillon giving back a mortgage to secure three notes dated October 23, 1838, for \$1,520.17 each, payable in one, two, and three years, with interest.

May 30, 1839, Wright's partition was confirmed.

October 22, 1839, Wright, in consideration of \$1, and that Dillon

had covenanted that neither he nor Taggart, nor Gray, nor Taylor, nor any one claiming under them, should seek to disturb the partition, conveyed to Dillon about 146 acres, out of the part which had been assigned in severalty to Wright in the partition.

October 25, 1839, John Dillon conveyed all his interest in the three tracts to George B. Reeve and Moses Dillon, jr., who thus became owners (subject to Taggart's mortgage) of an undivided two-thirds of the 132 and the 127-acre tracts, and (subject to the same mortgage) of, first, all the 1,300-acre tract not assigned to Wright, and the 146-acre tract conveyed by Wright to Dillon as aforesaid. It is claimed that Reeve and Moses Dillon made sundry payments to Taggart.

July 5, 1841, Taggart recovered a judgment in the circuit court of the United States for the Ohio district, against John Dillon, in a suit on the two notes first due, for \$3,526.78, and costs.

March 15, 1842, the deed from John Dillon to Reeve and Moses Dillon was recorded.

June 19, 1843, Reeve mortgaged his half to William Hamilton.

January 11, 1845, Taggart had execution issued on his judgment, which was levied soon after, on all that part of the 1,300 *acre [199 tract which was not set off to Wright in severalty; 2. On the undivided two-thirds of the two smaller tracts. The land was not sold for want of bidders.

September 8, 1845, a *vendi.* was issued, and the land was sold to Taggart.

March 12, 1848, the marshal conveyed to Taggart, recognizing Wright's title to one-third in severalty "set-off." This deed was acknowledged May 1, 1848, and never recorded.

January 4, 1849, Taggart conveyed to Hollister by warranty deed (except as to tax claims), according to the description in the marshal's deed.

July 26, 1849, the mortgage from Reeve to Hamilton, given June 19, 1843, was assigned to the complainant Hollister.

October 24, 1849, Hollister filed his bill, praying for an account of the amount due him by reason of the promissory notes and mortgages aforesaid, and for a decree that the defendants pay complainant the sums of money to be found to be due as aforesaid, and in default, that the equity of redemption be foreclosed, or the land be sold, and for general relief.

An amended bill charges the conveyance by John Dillon to Reeve

and Moses Dillon to have been fraudulent, having been made without any valuable consideration, when the grantor was embarrassed and insolvent, for the purpose of hindering and delaying creditors, etc., and avers that when complainant purchased of Taggart he had no notice "that said John Dillon had conveyed said lands to said Moses Dillon and George B. Reeve for any good or valuable consideration whatsoever, and, on the contrary," he "supposed and believed that he was purchasing and receiving a full and perfect legal title to said land, unincumbered and in fee simple." The amended bill further represents, "that, at the time of the purchase by said Taggart at marshal's sale as aforesaid, the said Taggart had no knowledge or notice that the said John Dillon had conveyed said lands to said Moses and George for any good or valuable consideration whatsoever,*nor had the said Taggart any actual knowledge or notice, that said John had parted with his title, until long after the execution of a deed from the said marshal to him, the said Taggart, for the lands aforesaid; but, on the contrary thereof, said bid was made and said deed received by said Taggart in good faith, under the full belief that said John still held the title to said land, and that no deed had ever been executed by him to transfer the same to the said Moses and George, or any other person; and if the said Taggart had known or believed that any valid conveyance had been executed by said John, conveying said land to any other person, the said purchase would not have been made; and if it shall appear that any such valid conveyance was made by the said John before said purchase," complainant "avers that said bid was made under a mistake of fact," etc. The bill further represents that it was not till sometime after complainant purchased the land and received a conveyance therefor, that he learned that said Moses and George claimed title to said land; and for the purpose of securing himself as well as possible in the title thereto, complainant obtained an assignment of the mortgages aforesaid and the notes thereby secured, etc.

The answer of Moses Dillon denies that the deed to Reeve and Dillon was without consideration, payments having been made to Taggart at different times of \$1,520.17, and \$200 for John Dillon, and the balance of the consideration, which was in all \$4,680, was in sundries, got of respondent and Reeve at various times. In this respect, the answer denies the allegation of the bill as to the purpose of the conveyance to respondent and Reeve. "Respondent

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further answering says that the said Joseph Taggart well knew, at least as early as October, 1841, when he paid him on account of John Dillon the aforesaid \$2,000, that he, respondent, was the owner of said land—that he and the said Reeve had purchased it of the said John Dillon, and that said \$2,000 was part of the consideration paid John Dillon therefor. Respondent further states that the said complainant, William *Hollister, at the time of [201 his purchase of said land from said Joseph Taggart, knew well that this respondent and the said George B. Reeve were the *bona fide* owners thereof; that their deed was duly recorded long before that time, and that he often applied to this respondent to purchase." The answer insists generally, that the mortgage to Taggart has been fully paid.

A replication was filed by complainant, and the case stands in this court on the original and amended bill, the answer of Dillon, the replication, and the following exhibits among them:

1. A letter from Taggart to Dillon, acknowledging the receipt of two drafts for \$1,000 each. 2. A certificate, signed by Creighton & Green, as attorneys of Taggart, that defendant is entitled to an abatement from the judgment of \$563.61 as of the date of its rendition. The amount of the purchase at the marshal's sale is insisted upon as a satisfaction of so much of the amount due on the mortgage.

Smythe & Sprague, for complainants, made the following points, among others:

I. The allegation of mistake in purchasing at the marshal's sale being in the amended bill, and that bill not calling for answer under oath, the allegation in the answer, that Taggart knew of the sale to Moses Dillon and George B. Reeve before that purchase, will pass for nothing. The complainant relies upon the undisputed fact, that Taggart took nothing by the purchase, and the irresistible inference therefrom, that he would not have thrown away \$2,435 in that way for nothing.

II. It is not necessary to prove a mistake any more than any other facts in judicial proceedings by absolute, direct proof; but the same may be inferred in any case from other facts, which reasonably lead the mind to that conclusion. 1 Story's Eq. Jur. 176; *Hyde v. Tanner*, 1 Barb. S. C. 75.

III. There was no satisfaction worked by the purchase at the

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marshal's sale. Under the circumstances of this case, in which the 202] *judgment creditor is the purchaser, and no title passes or the title fails, there is no more difficulty in going behind this supposed satisfaction than in going behind a receipt where nothing had in fact been paid. (The case of *Vattier v. Lytle*, relied on by the other side, so far from being authority in this case, only shows the necessity for the interference of a chancellor—that case being in a court of law.) Upon this point, the following cases are referred to: 11 Paige, 505; *Bank of Utica v. Munson*, 3 Barb. Ch. 586; *Price v. Boyd*, 1 Dana, 436; *Jones v. Henry*, 3 Littel, 427; 8 Dana, 183; *Muir v. Craig*, 3 Blackf. 293; *Warren et al. v. Helen et al.*, 1 Gilman, 220; 2 N. H. 85.

C. B. Goddard, for defendant.

I. Hollister ought not to have a decree vacating the *pro tanto* satisfaction of the judgment caused by Taggart's purchase. If Taggart brought a bad title, he has no relief in this court or elsewhere.

1. The following cases are relied on: *Vattier v. Lytle*, 6 Ohio 477; *Freeman v. Caldwell*, 10 Watts, 9; *England v. Clark*, 4 Scam. 486; 4 Kent Com. 466, note (4), 7 ed. 1851, citing 2 Bailey S. C. 48.

2. The "act for the protection of purchasers at judicial and other sales," passed March 2, 1846 (2 Curw. 1288, Swan 715), has settled the question, if any existed in this state. It recognizes the existing rule of *caveat emptor*, and gives such a remedy to the purchaser in such cases as the legislature thought worthy of it when the title is invalid by reason of defect in the proceedings—not when invalid by reason of other causes.

3. If the plaintiff were entitled to this relief, he should seek it in the forum where the judgment remains. *Barbell v. Griggs*, 3 Paige, 207.

4. A *scire facias* being in the nature of a bill in equity, the case of *Vattier v. Lytle* is authority as claimed.

5. The remark of the chancellor in *Starr v. Ellis*, 6 Johns. Ch. 203] *395, is not here applicable. We have nothing to do with the doctrine of merger. Chancellor Kent, in many cases, recognizes the doctrine that there is no remedy to the purchaser of a bad title, unless he have a covenant of warranty. Why should he have relief when purchasing at a public sale, in the face of the admitted law that he can have none when purchasing at a private sale.

6. The New York and New Hampshire cases cited for complainant are based upon the statute, 22 Hen. VIII, ch. 5, and colonial statutes of a like character. See 3 Barb. 586; 2 N. H. 84. The cases in Kentucky are cases of chattel sales, in which there is always, between vendor and vendee, an implied warranty of title. The Illinois case is directly in conflict with that cited on this side from 4 Scammon. *Arnold v. Fuller*, 1 Ohio, 458, is not applicable. The sale there was void by the defective process.

7. If the court can interfere to relieve a purchaser when the title *wholly* fails, it must do so where the title partially fails. If the court will relieve against mistakes as to *title*, it must relieve against mistakes as to *value*.

In addition to the briefs from which the foregoing points are taken, an oral argument was made by Mr. Stanbery for complainant, and Mr. Goddard for defendant; but no notes of that argument were furnished to the reporter.

RANNEY, J. Our opinion is confined to a single question. Upon the other questions arising in the case, further testimony is required; and it is agreed by the parties that the cause shall be remanded to the district court to enable them to take it.

Shall the amount for which the land was sold to Taggart, upon the judgment rendered by the circuit court, be allowed as a *pro tanto* satisfaction of the mortgage? The facts bearing upon this question are indisputable. The judgment was recovered upon two of the notes secured by the mortgage. The mortgage was given *to secure the purchase money, and covered the lands levied [204 upon and sold. Before the judgment was recovered against John Dillon, the mortgagor, he had sold and conveyed the land, subject to the mortgage, to Moses Dillon and George B. Reeve. It is perfectly evident that the land was levied upon, bid off, and a deed taken by Taggart, in ignorance of the conveyance; and most abundantly clear that he got no title to the land by the sale, and obtained no real satisfaction of any part of his debt.

But it is insisted by the defendants' counsel that it is altogether immaterial whether he did or not; that his notes were merged in the judgment, and the judgment in part satisfied by the sale; and that he can not now be heard to insist upon a vacation of that satisfaction, because the sale by the marshal excluded all warranty—the purchaser taking all risks, and subject to the full opera-

tion of the maxim, *caveat emptor*. The cases chiefly relied upon to support this position are *Vattier v. Lytle's Ex'rs*, 6 Ohio, 477, and *Freeman v. Caldwell*, 10 Watts, 9. These cases certainly go to the full length of holding that a court of law will not vacate the satisfaction of a judgment, and order a new execution, because it turns out that the property which produced the satisfaction did not belong to the judgment debtor. Nor do they contain any intimation that a court of chancery possesses more enlarged powers, or could, in such cases, afford any relief. This doctrine is far from being universally acquiesced in. The cases cited in argument very conclusively show that relief is given in several of the states of the Union; but there is very little agreement as to the mode of obtaining it, or the principles upon which it is afforded; while several of the cases referred to, seem to rest upon statutory provisions. The subject has been most fully considered by the New York court of chancery, in the cases of *Wambaugh v. Gates*, 11 Paige, 505, and *Bank of Utica v. Mercereau*, 3 Barb. Ch. 586. In these cases, while the opinion of the chancellor evidently was that the relief might be given upon 205] general equity principles, still, much reliance is *placed upon the analogy furnished by the statute, 22 Henry VIII, chap. 5, giving a new extent when the creditor was evicted, by title paramount, from the lands included in the first, and which had been adopted into the colonial legislation of that state.

It is clear, that neither class of cases can be made to depend upon any mere technical rule. The difference manifestly results from the greater or less weight given to considerations of public policy. Abstractly, there can be very little justice in permitting the debtor to pay his debt with the property of another, or in compelling the creditor to discharge it, before he has received an actual satisfaction. Where the debtor has lost nothing, and the creditor has received nothing, it seems most inequitable to permit a mere mistake to discharge the debt. But the fact, that exact justice can not be done in every case, is in no way decisive against the soundness of a general principle. If it is productive of general convenience and simplicity, and in most cases adapts itself to the business and intercourse of men in society, it needs very little experience to see, that it is, upon the whole, salutary, and ought not to be impaired by ingrafting numerous exceptions upon it. The difficulty, in many cases, of determining what is abstractly right, and what remedy ought to be afforded,

undoubtedly lies at the foundation of the refusal to interfere in any way, where the sale has been fairly made.

When the sale is made to a stranger, and the money has been paid over to the creditor, it is clear that the officer, who has done no more than his duty, ought not to be required to refund; and by no means certain, that the creditor, who has got no more than he was entitled to, and was under no obligation to investigate the debtor's title to the property, may not conscientiously retain the money of the purchaser—who must be presumed to have investigated, and to have been fully aware that he bought at his own risk. It is perfectly certain, that no contract to warrant the title can be inferred, on the part of the debtor. As against him, the whole proceeding is *im invitum*; while attaining the same end, in *sub- [206 stance, by a new execution on the judgment for the benefit of the purchaser, involves the danger of collision between the purchaser and adverse claimant, and deprives the debtor of all ability to defend his title to the property. It would never do to place the creditor, when he became the purchaser, in a better position than a stranger; as it would enable him to purchase without risk, and would furnish a strong inducement to him to throw doubts over the title, resulting, inevitably, in a sacrifice of the property, to the prejudice of the debtor.

If these considerations can not be deemed conclusive of the correctness of the rule adopted in the Pennsylvania and Ohio cases, they must be considered as going far to sustain them; and they derive a strong support from the analogy furnished in private sales, of real estate without warranty.

I have alluded to these considerations, with no view of approving or disapproving of the decision made in *Vattier v. Lytle*; but for the mere purpose of showing that the case now before us is neither within the terms or policy of that decision.

In cases like that, whether the appeal is made to a court of chancery, or to the equitable powers of the court that rendered the judgment, by a summary application, the party must stand upon the mistake he was under when he made the purchase; and the relief he demands, is a new execution to levy upon the property. The mistake furnishes the only ground of equitable interference, and the future use of the judgment the only object to be attained. Now, let it be granted, that considerations of public policy intervene to prevent the correction of such mistakes, and still this case is not

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affected. The present complainant has all the rights of Taggart, the original mortgagee; and he comes into court with the mortgage, and demands an appropriation of the property pledged for the payment of the debt. That the debt existed, and was secured by the mortgage, is admitted; and the only question is, has it been paid, in whole or in part? The defendants, who have purchased the [207] property for a nominal *consideration, subject to this very mortgage, say that it has; but how? They answer, by an abortive attempt to appropriate the property to the payment of the judgment. That this proceeding did not appropriate it, is certain; and equally so, that the defendants were in no way prejudiced by it. At the time it was pursued, Taggart was the undisputed owner of the legal title in fee, of this property.

The debt was due and unpaid, and nothing but the equity of redemption remained with the defendants. He had two undoubted remedies, which he might have pursued conveniently; but he could have but one satisfaction. He could have brought an action at law for the debt, and levied his execution upon any property then belonging to John Dillon; or he could have filed a bill in chancery for the foreclosure or sale of the equity of redemption, whoever might have been the owner of it. He pursued the first, and levied upon his interest, supposing John Dillon to have been still the owner, when in fact he was not, and obtained nothing by the sale.

His assignee is now pursuing the other. To deny him relief, we must not only say that Taggart, by his mistake, lost all further remedy upon his judgment at law, but, also, that he forfeited his legal estate in the property, as well as the debt secured by it, and all right to pursue this independent remedy. But the complainant asks for no further remedy upon the judgment, and claims no right under it. If he did, aside from the main question, a very conclusive answer would be, that we have no power over the records or process of the circuit court.

He asks us to correct no mistakes; but having an undoubted standing in this court, under an acknowledged head of equity jurisdiction, he simply asks us to say, whether what has been done in the circuit court amounts to such a payment and satisfaction of the mortgage as to bar *this* remedy upon it. We have no hesitation in saying that it does not.

When the jurisdiction of a court of equity is established, and [208] *its duty to hear and determine is unquestioned, it looks only

to the substance of transactions, and is never embarrassed by the forms or complications in which they may be involved. After forfeiture, all the rights that Dillon or his grantees had were in equity; and the only way in which they could redeem the land, or take the legal title from Taggart, was by paying the debt—not in form only, but in reality. To call the mistaken proceeding in the circuit court, by which nothing was accomplished and nothing obtained, in *reality* a payment of the debt, is in the face of common sense; and to permit it to operate as such, not for the benefit of the debtor even, but for those who have purchased his interest subject to the payment of the debt, and without paying, would hold the property without consideration, and shock the moral sense. If they were here with a bill to redeem upon no more equitable grounds, no one would suppose them entitled to any relief. And still, the case is not substantially different. The complainant is here with the mortgage and evidences of indebtedness, apparently unsatisfied, and asking a sale of the equity of redemption. The burden of showing a satisfaction is upon the defendants, and is in no way changed from the fact that the bill anticipates such a defense and seeks to avoid it. They stand upon the mere creature of a court of equity, and before they can ask its protection, they must do equity. They can not expect equity to suffer to be done in its name what it would not itself do, nor suffer them to obtain indirectly what it would not do for them directly. The case of *Vattier v. Lytle* was decided upon the authority of the early cases in Pennsylvania. Very recent decisions of the Supreme Court of that state, make it unmistakably clear that no such injustice as extending the principles of that case to one like the present, would be there permitted. In a case reported in 14 State R. 383, it is said that the mistake of the mortgagee in bidding for the land, under a misapprehension of his right to apply the proceeds to the payment of the mortgage debt, would furnish a sufficient reason for setting aside the sale. And in *Cummings' ap-* [209] peal, decided in 1854, the same ruling was made, in a case in every way more doubtful than the one before us. The purchaser had two claims, both due for the purchase money of the property, and both were in judgment, the largest of which was secured by mortgage, and the other not. He levied an execution, issued upon the smaller judgment, upon the property, and bid it off, under the erroneous belief that the sale would divest all liens and entitle him to apply the surplus to the payment of the mortgage debt. The court de-

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cided, that if the sale was permitted to stand the surplus would belong to the mortgagors; but they held it to be the duty of the court below, either before or after confirmation, to give the purchaser relief, by setting the sale aside and discharging him from his bid. In these cases, it will be observed the mistake was one of law purely, and the relief given opened the judgment for a new execution.

Upon the whole, without expressing any opinion as to the power of a court of equity to vacate the satisfaction of a judgment, on account of the mistake of a purchaser, and the want of title in the debtor to the property sold, we are clear that such a sale of mortgaged property to the mortgagee can not operate to deprive him of rights existing anterior to, and independent of, the judgment. That if such a mistake does not, on the one hand, lay a foundation for equitable relief, it does not, on the other, give any advantage to the debtor, when set up as a defense in a suit brought upon the mortgage, over which a court of equity has unquestioned jurisdiction.

We are therefore of opinion that the amount for which the property was sold, upon the execution issued from the circuit court, should not be allowed to diminish the amount to be recovered in this suit.

Decree accordingly.

210] *THOMAS EWERS v. WILLIAM RUTLEDGE ET AL.

Under the provisions of the act regulating appeals to the district court (Swan's Stat. 717), one of two or more defendants, against whom *jointly* a judgment has been rendered in the common pleas, may appeal the case to the district court, and his appeal will vacate the judgment—its lien, however, being preserved—and take up the whole case.

To perfect the appeal in such a case, it is not necessary for the appellant to give a bond that will cover the faults of his co-defendant; it is sufficient if it cover his own.

ERROR to the district court of Muskingum county.

William Rutledge and others, plaintiffs below, brought a civil action, in the court of common pleas, against Samuel Winegarner and Thomas Ewers, upon an administrator's bond, given by Winegarner as principal, and Ewers and others as sureties, reciting that Winegarner had been appointed administrator, with the will an-

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nexed, upon the estate of William Rutledge, Sen., deceased, and conditioned according to law. The plaintiffs claimed to be distributees, and that Winegarner had failed to pay, etc.

The defendants below, Winegarner and Ewers, put in a joint answer, setting up payment by Winegarner, and release of him. This was found against them in the court of common pleas, and a joint judgment rendered against them for the several sums due to each of the plaintiffs. The defendants gave a joint notice of appeal, which was perfected by Ewers alone in a bond, of which the following is a copy:

BOND.

Know all men by these presents, that we, Thomas Ewers, Simon Thomas, and Henry Hursey, of the county of Muskingum, in the State of Ohio, are held and bound firmly unto William Rutledge, Robert Irwin and Elenor Irwin his wife, Josiah Rutledge, Zachariah Rutledge, William D. Rutledge, Nathan Ships and Elizabeth E. Ships his wife, Thomas F. Rutledge, Isaac McCammon and Mary Jane McCammon his wife, and Simon Hursey, in the penal sum of twenty-four *hundred and forty dollars and sixty-two cents, [211 lawful money of the United States; to the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, signed and dated at Zanesville, this 19th day of June, A. D. 1854. The condition of the above obligation is such, that, whereas, at the May term, A. D. 1854, of the court of common pleas within and for the said county of Muskingum, in a certain civil action, in said court of common pleas then pending, wherein the said obligees were plaintiffs, and Samuel Winegarner and Thomas Ewers were defendants, a certain judgment was, by the said court of common pleas, rendered in favor of the said plaintiffs, and against the said defendants, for the sum of eleven hundred eighty-eight dollars and five cents, and thirty-two dollars and twenty-six cents costs of suit; and, whereas, the said defendants, at the said term of the said court of common pleas gave due notice of their intention to appeal from said judgment to the district court, within and for the said county of Muskingum, and the said defendant, Thomas Ewers, is now desirous of perfecting such appeal. Now know ye, that if the said defendant, Thomas Ewers, shall abide and perform the order and judgment which may be made or rendered by the said district court against him, in this behalf, and shall also pay all moneys, costs, and damages, which may be required of or awarded against him by the said district court, in this behalf,

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then the above obligation shall be void; otherwise, in full force and virtue.

THOMAS EWERS, [SEAL.]

SIMON ^{his} ~~mark~~ THOMAS, [SEAL.]

HENRY HURSEY, [SEAL.]

Accepted and approved by me, this 19th day of June, A. D. 1854.

CH. C. RUSSELL,

Clerk of the said Court of Common Pleas.

Witness: S. R. TUCKER.

At the September term, 1854, of the district court, a motion was made by the defendants in error to dismiss the appeal. The successful result of this motion is the error complained of.

The following is copied from the record :

Wm. Rutledge et al.

vs.

Samuel Winegarner and Thomas Ewers.

} Appeal by Ewers.

And now come the plaintiffs herein and move the court to dismiss the appeal, and for cause show to the court—

That, at the May term, 1854, of the court of common pleas of this county, plaintiffs recovered a judgment against the said Samuel 212] Winegarner and *Thomas Ewers, for the sum of \$1,188.05, and \$32.26, costs; that at the said term of said court, the said defendants gave notice of their intention to appeal from said judgment to the said district court; that on the 19th day of June, 1854, the said Ewers, with surety to the acceptance of the clerk of said court of common pleas, executed a bond to plaintiffs, conditioned, however, *not that the said Winegarner and Ewers should abide and perform the order and judgment of the district court, etc.*, but conditional that the said Ewers should abide and perform, etc., as will more fully appear from a copy of the bond hereto attached; that at the said May term, 1854, in the said court of common pleas, on the rendition of said judgment against Winegarner and Ewers, the defendants gave notice of appeal generally, and that there was no allowance by the said court of common pleas to the said Ewers, to appeal any separate part of said case.

That the subject-matter of the action in which said judgment was rendered, was and is not capable of the separation contemplated and provided for by section 4 of an act regulating appeals to the district court, passed March 23, 1852. Swan, 717.

T. J. TAYLOR, *Attorney for Plaintiff.*

(See copy of bond before.)

At the said September term, A. D. 1854, of our said district court, to wit, on this 23d day of September, A. D. 1854, on motion of plaintiffs, and it appearing to the court that the appeal bond in this case is conditioned for the payment, by the obligors, of such judgment as may be rendered in this court against the defendant, Ewers, and is not conditioned for the payment of any judgment which may be rendered in this court against the defendant, Winegarner, it is ordered by the court that the appeal be dismissed; provided, however, that if the defendants, or one of them, shall, within thirty days from this day, execute a new appeal bond, to the acceptance of the clerk, conditioned in the form prescribed by the statute in this behalf, for the payment of such judgment as may be rendered against the said defendants, Ewers and Winegarner, or either of them, then the order of dismissal above made shall not take effect, but the cause shall stand continued to the next term for trial. The defendant, Ewers, excepts to the decision of the court upon said motion, and asks that this exception be here noted, which is accordingly done.

Goddard & Eastman. for plaintiff in error.

T. J. Taylor, for defendant in error.

*THURMAN, C. J. By the first section of the act regulating [213] appeals to the district court (Swan's Stat. 717), it is provided "that appeals may be taken from all final judgments in civil cases at law, decrees in chancery, and interlocutory decrees dissolving injunctions, rendered by the court of common pleas, etc., by *any party* against whom such judgment or decree shall be rendered, or who may be affected thereby, to the district court; and the cause so appealed shall be again tried, heard, and decided in the district court, in the same manner as though the said district court had original jurisdiction of the cause."

The second section requires notice of the intention to appeal to be entered on the record of the court in which the judgment or decree is rendered, at the judgment term, and an appeal bond to be filed within thirty days from the rising of the court.

The third section prescribes the penalty of the bond, and who shall be its obligee, and requires it to be "subject to a condition to the effect, that the party appealing shall abide and perform the order and judgment of the appellate court, and shall pay all moneys,

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costs, and damages which may be required of, or awarded against said party, by such court."

The fourth section allows an appeal of a part of a case, where the interest of the appellant "is separate and distinct from that of the other party or parties."

The ninth section provides: "That when an appeal shall be granted, and bond and security given thereon as aforesaid, the judgment or decree rendered in such case, in the court below, shall thereby be suspended."

Under this legislation, we are to inquire whether the district court erred in dismissing the appeal in this case.

In the first place, it is to be observed that counsel are right in saying that section 4 of the act has no application here. The purposes of that section may be seen by a reference to *Hocking Valley Bank v. Walters*, 1 Ohio St. 201; *Glass v. Greathouse*, 20 Ohio, 511; and *Emerick v. Armstrong*, 1 Ohio, 516.

214] *In the next place, we are of the opinion that if Ewers' appeal can be sustained, it brings up the whole case. The judgment was joint, and we do not suppose that the legislature intended that a joint judgment should be enforced against one of the defendants by execution, and suspended against the other. It is true that section 9, before quoted, differs in language from the former statutes respecting appeals. Under the old law, an appeal vacated the judgment appealed from, but preserved its lien; the present statute declares that the judgment shall be "suspended." But the purpose in both statutes is, we imagine, the same—namely, to preserve the lien—for the legislature could not have intended that there should be two judgments in force; one rendered by the common pleas, and the other by the district court.

Under the old law, one of two or more judgment debtors had a right to appeal, and if the judgment were joint, his appeal vacated it and took up the whole case, however unwilling his co-defendants might be. This was expressly decided in *Emerick v. Armstrong*, *supra*, and affirmed in *Glass v. Greathouse*, *supra*, upon reasons that are entirely satisfactory, and which, we think, apply with as much force to the existing statutes as to those under which the above decisions were made. Hence it was said in *Hocking Valley Bank v. Walters*, *supra*, which was a case under the present statute, that an appeal vacated the decree appealed from.

In the case before us, the district court dismissed the appeal, be-

cause the bond was not conditioned for the payment of whatever judgment should be recovered against the defendant, Winegarner, but only for the payment of such judgment as should be recovered against the appellant Ewers.

If this is a correct construction of the statute, it is very evident that the right of appeal is of no value whatever to many defendants, and in a great variety of cases. For of what use is it for a defendant, who has a valid defense, to appeal from an erroneous judgment or decree against him, and make good his defense [215] in the appellate court, if he is to be bound by the appeal bond to pay whatever judgment may be recovered against his co-defendant, who has no defense? True, in actions *ex contractu*, the general rule, before the adoption of the code, was, that the plaintiff must recover against all the defendants, or he could recover against none; and hence, in such cases, an appellant incurred no additional risk by executing an appeal bond covering the default of his co-defendants as well as his own. But in suits in chancery, actions *in tort*, and certain exceptional cases in actions *ex contractu*, a different rule prevailed, and a recovery might be had against a part only of the defendants, and the others be discharged. In such cases, therefore, to require an appellant to stipulate for his co-defendants as well as for himself, would be, in a vast number of instances, to deprive him of any benefit from his appeal. He might make good his defense and obtain a judgment or decree against the plaintiff for costs, and yet be compelled, by force of the appeal bond, to pay the plaintiff's claim against his co-defendants—not because he was originally bound for them, or ought in equity or good policy to be so, but simply because they were unable to pay.

We see nothing in the statute that requires so hard a construction. It provides that an appeal may be taken "*by any party*," against whom a judgment or decree shall be rendered, "or who may be affected thereby;" and that the condition of the appeal bond shall be "to the effect, that the *party appealing* shall abide and perform the order and judgment of the appellate court, and shall pay all monies, costs, and damages which may be required of, or awarded against *said party*, by such court." The "order and judgment" here mentioned, are an order or judgment *against the appellant*; the expression, "*said party*," refers to the appellant; and the word "*party*" is not used as a noun of multitude only, necessarily including all the defendants, but means the one, or more of them—

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all, or less than all—who shall take the appeal and execute the bond.

216] *It is admitted that one of several defendants may appeal the case; and it will not be denied that, if a judgment be recovered against him, he may become liable upon his appeal bond, although no judgment shall have been rendered against his co-defendants; but how can either of these things be, if the word "party" necessarily means all the defendants?

Had this case arisen under the act of 1831 (Swan's old Stat. 682)—which required the appeal bond to be "conditioned for the payment of the full amount of the condemnation money, in the Supreme Court, and costs, in case a judgment or decree should be entered therein *in favor of the appellee*"—there might be more doubt about it. But even under that statute—in view of all its provisions and the decisions before referred to, holding that one of several defendants should appeal the whole case—it might be questioned whether a defendant, against whom no judgment was recovered in the Supreme Court, could be made liable, on the appeal bond, to pay a judgment rendered against his co-defendant. Upon this question, however, we neither express nor intimate an opinion, because it is in nowise involved in this case. It is sufficient that the act under consideration requires no such hardship.

The order quashing the appeal must be reversed, and a writ of procedendo awarded.

LESSEE OF THOMPSON'S HEIRS v. GEORGE GREEN.

An action of ejectment, on the demise of husband and wife, to recover possession of the wife's lands, is barred by an adverse occupancy of the lands for more than twenty-one years before the commencement of the suit.

The husband having a freehold in the lands, with the present right of exclusive enjoyment, and the wife or her heirs only the reversion, the former has the only right of entry.

217] *If the exclusive right of possession which before belonged to the husband, be lost by him through the adverse possession of a third person, the wife's right of entry, which before was postponed to the termination of the coverture, can not now accrue at an earlier period; and, until it does accrue, no action of ejectment can be maintained, predicated upon her interest in the land.

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The whole object and purpose of the statute of limitations are accomplished, when it is made to save to the wife such rights as she has in the lands, and when it gives her, at all times, remedies adapted to the redress of any injury she may sustain.

This is done by affording her, while her estate is in reversion, reversionary remedies, and, when her right of entry arises, the possessory remedy by ejectment.

EJECTMENT. Reserved in Licking county.

The facts appear in the following agreed statement:

"It is agreed by the parties to submit the trial of the issues, joined in this case, to the court, on the following agreed statement of facts:

"*First.* It is agreed that the plaintiff has no complete paper title.

"*Second.* That as to all of the lessors of the plaintiff, except John Smith and Rhoda his wife, the defendants, by reason of their continued possession for more than twenty-one years before the commencement of this suit, are entitled to recover, and that the plaintiff, except as to the said Smith and wife, is not entitled to recover.

"*Third.* As to said John Smith and wife, it is agreed that their title to said lands is in right of the said Rhoda, and that, at the time their right of action accrued against the defendant, she was the wife of the said Smith, and at all times since has been and still is his wife, and that more than twenty-one years has elapsed since the right of action accrued in behalf of said John Smith and Rhoda Smith against the defendant.

"*Fourth.* It is also agreed, that if the court are of opinion on the above statement of facts, that the said John Smith and wife, *as [218 lessors of the plaintiff, are not entitled to recover, judgment shall be rendered in favor of the defendant. But, if the court shall be of opinion that the said John Smith and wife, as such lessors, are, on said statement of facts, entitled to recover, judgment shall be rendered on that count of the declaration, founded on the demise of said Smith and wife, for one undivided sixth part of the lands in said count described. June 16, 1853."

Smythe & Sprague, for plaintiff.

Follett & Hunter, for defendant.

Smythe & Sprague, for plaintiff, made the following points:

Where parties jointly interested can enforce their rights sepa-

rately, the protection of any disability extends no further than the person within its provisions. But where their rights can not be enforced separately, and the protection of the statute can not be secured without covering other interests, the benefit of the disability claimed by one avails all. 10 Ohio, 362; 12 Ohio, 351.

Married women can not sue separately from their husbands, but in all cases, where their rights are to be enforced, the husband must join.

From these two propositions it follows, that if a married woman has any rights or interests in her own lands, which are protected or can be enforced by the laws of Ohio during the life of her husband, then she must bring her action jointly with her husband, and, instead of his laches destroying her rights, the protection or saving of her rights by disability will save and protect his.

Hence it becomes the most important inquiry in this case, whether married women have any interest or rights in their own lands in Ohio, which are entitled to the protection of the laws during the life of the husband, or whether their rights are entirely absorbed, 219] used up, and suspended by the paramount influence *of her husband, "the baron," so long as he continues to live.

Since the statute of 32 Henry VIII., the general tendency of the legislative and judicial mind has been toward recognizing a right in a married woman to be protected in the enjoyment of her own estate.

It has been held in England that she may join with her husband and recover in an action of ejectment, on the joint demise; that although her husband may himself waste and alienate her estate, yet if he does so alienate it, and a stranger commits waste upon her inheritance, she may maintain an action of waste against the stranger in the joint names of herself and husband. 2 Phil. Ev. 264, and authorities there cited; 2 Kent's Com. 130; Clancy on Husband and Wife, 160. Her right to maintain an action for waste, and to be protected by law in the possession and enjoyment of her own land, has been more or less recognized in this country. 2 Kent's Com. 130; 5 Barr, 103; 8 Humph. 298; 44 Ohio L. 75.

Since the passage of the Ohio statute last referred to, ejectment can not be maintained for lands of the wife, on the separate demise of either husband or wife. Her rights and interests are inseparable from those of her husband in her lands, and can not be enforced

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separately. Therefore she is within the rule in 10 Ohio, and the protection of her disability saves the rights of both.

Her rights, thus saved to her by the statute of limitations by reason of her disability, can be enforced during the life of her husband. To deny this right of action is to treat her disability not as a personal privilege, but as an act of outlawry, to suspend all her rights during coverture.

If she can not prosecute her rights while the husband is living, both she and her heirs may lose the inheritance. By virtue of his estate by the curtesy, the husband would, at the decease of his wife, be entitled to the immediate possession of her land, and *if [220 he should live after her death longer than the time limited for commencement of the action after removal of the disability, the estate would be lost entirely.

H. H. Hunter, for defendant, made the following points:

The demise for the recovery of the wife's land *must* be joint, by husband and wife. No recovery can be held on the separate demise in the name of the wife. Com. Dig., title Baron and Feme, vol. 10; also, title Pleader, 2 A. I; *Weller et al. v. Baker*, 2 Wilson, 423, 424; *Atkins v. Rittenhouse et al.*, 5 Barr, 103; *Watson v. Watson*, 10 Conn. 77; *Neal et al. v. Robertson et al.*, 2 Dana, 87.

A recovery by plaintiffs in ejectment, on the joint demise of husband and wife, is a recovery by the husband. The possession pursuant to the recovery, during the coverture, is the possession of the husband.

The husband has now, in Ohio, the same right of possession of the wife's lands, and to appropriate to his own use rents and profits thereof, as he ever had heretofore, and if he survive her, his right as tenant by the curtesy now, as formerly, endures during his life. All these important rights are secured to the husband in the subject-matter of the recovery, who, upon the joint demise of himself and wife, recovers lands in an action of ejectment.

The statutes of limitation are called statutes of repose, and are intended to quiet the possession of men long enjoyed, and to save them from endless strifes and litigations. Courts, in applying the rules of construction to these enactments, should be governed by the practical lights of experience and the realities of life, rather than by any whimsical notions of the hardships likely to arise to married women by the loss of their rights for want of prosecution during coverture. There is no soundness in the argument which

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asks the court, as a matter of construction, to give to those who would come in under the assumed protection of the disability of a 221] *feme covert*, any greater benefits than they would otherwise *be entitled to against the provisions of the statute. In this case, John Smith is barred, although his wife may not be, and any recovery to be had in this case, on the joint demise of himself and wife, is, expressly and directly, a recovery *by him*, which can not be suffered without an utter disregard of the statute.

The cases in 10 Ohio, 362, and 12 Ohio, 351, are not in point, as ejectment is a possessory action, and the possession recovered on the demise of husband and wife is, in fact, so long as the coverture endures, and his estate in curtesy afterward, solely that of the husband in right of the wife. He is seized of the entirety during the continuance of his interest; whereas, in the cases in 10 and 12 Ohio, it will be found that those who labored under the disability had an immediate interest in the thing to be recovered; but the right of action being joint, and not several, the courts, on a principle of necessity, were compelled to suffer those who, if they had not been so jointly interested, would have been barred, to join in the action, and, as a consequence, to participate in the recovery.

The adverse decision in *Watson v. Watson*, 10 Conn. 77, is merely the result of an equally divided court, so that, as an authority or precedent for the consideration of this court, the bearing of the case is as much for as against the defendant.

In a more recent case—*McDowell and wife v. Potter*, 8 Barr, 189—the Supreme Court of Pennsylvania has holden a contrary doctrine.

The soundness of the distinction made in that case by Judge Rogers in delivering the opinion of the court, between the case of a *feme covert* and persons laboring under other disabilities, such as infancy and the like, will at once be perceived and acknowledged.

RANNEY, J. A majority of the court concur in the opinion that the law applicable to the facts of this case, requires a judgment for the defendant.

222] *It appears from the agreed statement of facts that he has been in the adverse occupancy of the lands for more than twenty-one years before the commencement of this suit; and the only question presented is, can an action of ejectment be maintained, on the

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demise of husband and wife, to recover possession of her lands, after such a lapse of adverse enjoyment? That he is conclusively barred, and that no action could be sustained on his demise alone, is conceded on all hands. Can he avoid the effect of this bar by joining his wife with him in the action? To determine this, it is necessary to understand clearly what interest or estate the husband has in the lands of his wife, and the extent and purpose of the remedy by an action of ejectment. If it shall appear that the remedy operates only upon the interest of the husband, and he alone gets the benefit of a recovery, I take it to be undoubted that a bar upon his right is an effectual bar to the action.

"If the wife, at the time of the marriage," says Chancellor Kent (2 Com. 130), "be seized of an estate of inheritance in land, the husband, upon the marriage, becomes seized of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives; and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy." "The emblements growing upon the land, at the termination of the husband's estate, go to him or his representatives." "During the continuance of the life estate of the husband, he sues in his own name for an injury to the profits of the land; but for an injury to the inheritance, the wife must join in the suit, and if the husband dies before recovery, the right of action survives to the wife."

The Supreme Court of this state has been no less explicit. In Canby's *Lessee v. Porter*, 12 Ohio, 80, it is said: "The interest of the husband is a legal estate; it is a freehold during the joint lives of himself and wife, with a freehold in remainder to himself for life, as tenant by the curtesy, and a remainder to the wife and her heirs in fee. It is a certain and determinate interest, whose value may be easily ascertained by reference to well-known rules. It is, in every sense, his 'land,' within the meaning of the statute, and liable to respond for his debts."

It is quite unnecessary to refer to other authorities upon a question upon which all the elementary books and decided cases are agreed. By the common law, the freehold of the husband thus acquired was as perfect, absolute, and unfettered, as though derived by deed, and could be aliened by him without the consent of the wife, or taken upon legal process for his debts. It arose by operation of law as an

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incident to the marriage, and carved out of the estate of the wife a freehold interest in favor of the husband, leaving in her, or her heirs, only the reversion to be enjoyed after the termination of the life estate.

Such being the nature and extent of the husband's interest, the question arises, is this action brought to recover that interest? Lord Mansfield, in the leading case of *Atkyns' Lessee v. Horde*, 1 Burr. 60, says: "An action of ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter. Therefore, it is always necessary for the plaintiff to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute. Twenty years' adverse possession is a *positive title to the defendant*: it is not a bar to the action, or a remedy of the plaintiff only, *but takes away his right of possession*." And again, "In truth and substance, a judgment in ejectment is a recovery of the possession (not of the seizin or freehold) without prejudice to the right, as it may afterward appear, even between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor: and in respect of the freehold, his possession inures according to right. If he has no title, he is in as a trespasser; and without 224] *any re-entry by the true owner, he is liable to account for the profits." Mr. Angell, in his late work on Limitations, sec. 369, lays down the general rule, that whenever the right of entry "is taken away by the lapse of the prescribed period, the consequence is, that no action of ejectment (the privilege of bringing which is wholly dependent on the right of entry) can be sustained." And he adds: "Indeed, the right of entry and the right to maintain ejectment are so much alike, in legal sense, that one may be used in that sense for the other."

The application of these doctrines to the case in hand is very obvious. The husband having a freehold, with the present right of exclusive enjoyment, and the wife or her heirs only the reversion, the former, of course, has the only right of entry. But upon this right, and upon all the interest the husband had in the land, the statute has had its full operation for such a length of time as, in the language of Lord Mansfield, to give "a positive title to the defendant," and to "take away his (the husband's) right of possession." The

defendant is now, by force of the statute, invested with all that the husband formerly had; and as the wife before had no right to the possession as against her husband, she has just as little right now against one invested, by operation of law, with all his rights and interests. The exclusive right of possession which before belonged to the husband, has been lost by him and acquired by the defendant; and as the wife's right of entry before was postponed to the termination of the coverture, it can not now accrue at an earlier period; and until it does accrue, it is perfectly clear no action of ejectment can be maintained predicated upon her interest in the land. The husband's right of entry, then, is lost by him, and acquired by the defendant; and the wife's has not yet accrued. The husband, therefore, has no right to recover alone, because he has no title; and if the wife could sue, she would have no right to recover alone, because she has no present right of entry. As neither has any right upon which a recovery can be had, suing *alone, I confess myself wholly [225] unable to see how, by joining their fortunes together, a cause of action is made.

If the husband had conveyed his life estate by deed, or it had been sold for his debts, no one would for a moment suppose, that the purchaser could be dispossessed by an action brought by husband and wife; although she had not joined in the deed in the one case, and was no party to the judgment in the other, so that nothing but the estate of the husband had passed. And yet neither mode would more effectually take away his right of possession, and invest another with a more perfect title, than an adverse possession for twenty years. Neither is better understood as an acknowledged method of losing and acquiring a right to real property, than the operation of the statute of limitations.

The statute does not spend its force upon shadows; it operates upon substantial interests, and, with the interest, carries all the remedies incident to the right. It has had its effect, in this instance, upon the estate of the husband—has divested him of it, and given it to the defendant; and with the loss of the estate, has deprived him of all remedy, in whatever form pursued, for its recovery. It has had no effect upon the estate of the wife. The defendant has got no more than the marriage gave to the husband, and holds it subject to all the contingencies to which it would have been subject had it remained in his hands. While the life estate continues, the law arms her with appropriate remedies to prevent injuries to the

reversion; and when it terminates, gives her the benefit of the action of ejectment, to recover the possession. It *must* terminate with his death, if she survives him; and it *may* terminate before, by his fault, followed by a divorce; and under our statutes, I have no doubt, that such a state of facts as would warrant a court of chancery in restoring to the wife the rents and profits of her lands, by placing them in the hands of a receiver, would give the receiver the remedy, by ejectment, to recover the possession. As soon as she has the *right* to the possession, and the enjoyment of the rents and profits, 226] the law gives *her* this action to recover it. But the statute of limitations was never intended to invest her with an estate she had not without it—to give her a right of entry in lands, the possession and profits of which belonged exclusively to her husband. Its whole object and purpose is accomplished, when it is made to save to her such rights as she has; and the law is effectually vindicated from all reproach, when it gives her, at all times, remedies adapted to the redress of any injury she may sustain. This is done by affording her, while her estate is in reversion, reversionary remedies; and when her right of entry arises, the possessory remedy by ejectment. If any wrong is done her, by the principles of the common law, it comes of investing the husband with a life estate in her lands, entitling him to the possession, and not from refusing her a remedy to recover the possession, the right to which she has voluntarily surrendered, and with which he is invested. As the marriage gave her valuable rights in the property of the husband, and bound him to the payment of all her debts, and for her support during the coverture, the old-fashioned sense of justice gave him this right to the use and enjoyment of her lands, in the way of compensation. In later times, some devoted champions of the rights of women, have arrived at the conclusion that it is but a relic of barbarism, founded upon man's tyranny and oppression, which demands instant abrogation. It may be so; I do not undertake to decide that it is not. If it is, the power of correction is with the legislature, and not the courts. Until that body acts, we must be content to perform the ungallant duty of administering the law as we find it; and until the right of possession is taken from the husband and restored to the wife, we can not very consistently hold, that a remedy which depends wholly upon the *legal right of possession*, can be successfully pursued, in right of the wife, against one who has acquired the husband's legal right to the possession. Indeed, when the desired re-

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form shall take place, and the marriage contract shall leave the wife in the full enjoyment of all her rights *of property, and the [227 right to pursue every legal remedy, as fully and effectually as though she were sole and unmarried, it may be worth while to consider, whether she should not assume some of the responsibilities of a *feme sole*, and whether, in justice to others, male and female, she should be exempted from the operation of those beneficial statutes of repose, so essential to the security of titles, and permitted to disturb a possession, taken in the honest belief of a perfect right, and upon which a lifetime of labor has been expended—as is very often done, and may possibly be attempted in this case.

But all this belongs to the law as it might be, and not as it is. As it is, according to our understanding, the marriage invests the husband with a freehold estate in the lands of the wife, entitling him to the exclusive possession during coverture, and, independent of the statute of 1846, subject to be conveyed by him, taken for his debts, or lost by his laches. During its continuance, he alone has the right of entry, and consequently the right alone to maintain the action of ejectment to recover the possession, when it is wrongfully withheld from him. And although he may, for conformity, join the wife with him in the demise, it is still upon his *right* alone that a recovery can be had; and whatever has barred that right, has effectually barred the action.

This view of the subject is supported by the decided weight of authority. By an English statute, a married woman is allowed five years after disability removed, within which to enter and avoid a fine levied during the coverture. In *Doe ex dem. Wright v. Plumptre*, 3 Barn. & Ald. 474, the action was brought by husband and wife, more than five years after the fine was levied—Best, J., before whom it was tried, being of opinion that, although the wife of the lessor of the plaintiff, if she survived him, would be entitled to enter within five years after his death, yet that her husband, not having made an entry or brought his action within the time prescribed, was barred by the fine, directed the jury to find a verdict for the defendant. The plaintiff's *counsel moved for a new trial, and con- [228 tended that the husband, who claimed in right of his wife, might enter at any time during the coverture. But, the report states, "the court were clearly of opinion that the husband, not having entered within the five years after his right accrued, was barred by the fine."

Watson and wife v. Watson, 10 Conn. 77, is one of the earliest.

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cases to be found in the American reports. It is only important as presenting, in a forcible manner, the reasons upon both sides of the question. Five judges sat upon the hearing; two (Judges Daggett and Bissell) concurred in opinion, that the action was not barred; while two others (Church and Williams) thought differently; and the fifth (Judge Peters) gave no opinion. In the opinion of the former, it is conceded that the statute had barred the rights of the husband; but it is asserted that this right is merely incidental to the estate of the wife, growing out of the coverture, and not investing him with any distinct legal estate; that their interests are not separate, in such a sense that he can be barred, without directly affecting her substantial rights; that she *must* join with him in the action; and a denial of her right to recover would be to hold that no person under disability, after the prescribed time had elapsed, could maintain an action until the disability was removed. And to distinguish it from the English cases relating to fines, it is claimed that a fine is a species of conveyance which passes the whole right, and operates by way of bar to the *right of property*, while the statute of limitations is a bar to the *remedy* only.

It is evident that this whole argument is built upon the denial of any distinct estate in the husband, capable of separation from that remaining in the wife. This is certainly opposed, not only to the teachings of every elementary author, but to the decision in *Canby's Lessee v. Porter*, already cited. It is there expressly asserted to be a legal estate of freehold for the joint lives of husband and wife; and it never has been doubted that it might be separated, 229] without her consent, from her estate in reversion, by *his conveyance, or by being siezed for his debts. So far from her being an indispensable party to the action to recover the possession, it is well settled that it may be recovered upon his demise alone; while the position in respect to the operation of the statute of limitations, is directly opposed to the doctrine of Lord Mansfield, in the leading case of *Atkyns' Lessee v. Horde*, where, as we have seen, it is held not a bar to the action or remedy of the plaintiff only, but takes away his *right of possession*, and confers a *positive title upon the defendant*; and to the numerous cases in which it has been held to confer a perfect right of entry, enabling the occupant to recover in ejectment without other evidence of title. *Chiles v. Jones*, 4 Dana, 483; *Larman v. Huey*, 13 B. Mon. 447; *Breeding v. Taylor*, Ib. 482.

It is certainly true, that a person under disability may sue at any time during its continuance, and need not wait until it has terminated. Ang. on Lim., sec. 195. But a capacity to sue and enforce such rights as a person in such situation may have, is one thing; and the question whether he has such rights, adapted to the remedy sought, as will enable him to succeed, is quite another and different thing. While the statute protects the one, it makes no attempt to confer the other. The rights of such persons, as well as others, to property; must be sought elsewhere, but when found to exist, they are not to be lost or forfeited by a failure to enforce them.

These positions are all examined with marked ability in the opinion of Judge Church; and he arrives at the conclusion, that by the common law, the husband has a freehold interest in the lands of the wife, giving him a vested estate in possession, and the right of entry, and, necessarily, postponing the right of entry to the wife and her heirs, until after coverture ended. That upon this right of entry the statute operates, and that "to hold otherwise, would be to claim the strange doctrine, that there may be a freehold estate in possession without a seizin of it; or that there may be a seizin without a possibility of disseizin." That during *the cover- [230] ture, he has the entire control of the estate. is entitled to the rents and profits; it is subject to his disposition, liable to his debts, and may be lost by his *laches*; and whether the right of entry is lost in the one way or the other, it equally bars all interests during the existence of the particular estate. That he can not restore himself to his lost and forfeited rights, by joining his wife with him in the action; that if a recovery is had, it is his recovery; he alone is let into the present and future possession of the land, and recovers the meane profits as damages.

McDowell v. Potter, 8, Barr 189, was an action brought by husband and wife to recover the proceeds of a legacy, collected by the defendant, belonging to the wife. More than six years having elapsed since it was received, and the statute being pleaded, one of the questions arising was, whether the action was barred. The court held that it was, notwithstanding the plaintiffs gave evidence that the husband had always treated it as the separate property of the wife. They admit the right of the wife, if she should survive the husband, to sue for and recover the money, within six years after disability removed; but as a recovery in this action would inure to his benefit, and reduce the money to his possession, they

Lessee of Thompson's Heirs v. Green.

considered the action as his and not hers, and the delay as his fault, effectually barring all his rights. If it should be admitted that the doctrine, in this case, was pressed too far, and that the wife stood in a position to derive some legal benefit from the recovery, either by its inuring to her sole benefit under the arrangement, or through her rights of survivorship; still, its force is not impaired, when applied to a case like this, where no attempt to surrender the marital right exists, and where the remedy goes no deeper than the husband's exclusive right to the possession, and entitling him alone to all the fruits of the judgment, direct and incidental.

The very question upon which this case depends, has been repeatedly decided in favor of the bar, by the court of appeals in Kentucky. *Neal v. Robertson*, 2 Dana, 86; *Downing v. Ford*, 231] *9 Dana, 391; *Gill v. Fauntleroy*, 8 B. Mon. 186; *Davis v. Tringle*, Ib. 542; *Sharp v. Head*, 11 B. Mon. 277.

The point was first presented in the case cited from 2 Dana. The act which governed the case provided that "the limitation prescribed in this act shall not extend to *femes covert*, etc.; but such persons shall be at liberty to institute such suits *at any time* within seven years after their disabilities are removed." The court say: "There is nothing in this language which does, of itself, constitute a saving in favor of the husband, so as to prevent his being barred. If there be such saving, it must result from the general principles of law, in order the better to secure and preserve the right of the wife. We are not aware of any principle that will so operate." . . . "The saving was not intended to guard his interests against the effect of his own laches, but to save hers, so far as they were separate and disconnected from his. We do not perceive wherein their interests are so intimately blended, as indispensably or even necessarily to require an enforcement of her right in his lifetime. Their interests are so far divisible, that he can maintain a suit in his own name alone for the land, and can, by his separate deed, alienate it during their joint lives. So where a recovery is had in a suit brought by both, it is still for his sole benefit during his life. As, then, the recovery is for his sole benefit, and as his separate alienation bars a recovery, on a demise, in the names of both, no good reason is perceived why he should be permitted to avail himself of the saving in favor of the wife, to protect him against the effects of laches in this, more than in any other description of cases."

The case of *Sharp and Wife v. Head* was decided as late as 1850.

It was an action of ejectment, brought on the demise of husband and wife, to recover lands that had descended to her during the coverture. The statutory bar had run against the husband, and the court held the action barred. They say: "He might, as husband, have maintained ejectment, on a demise, in *his own [232 name, and have recovered for his sole benefit during their joint lives, because he had an interest and legal title during the joint lives of himself and wife. As against him the statute continued to run. Uniting his wife's name with his, whilst it did not prejudice her rights, did not aid him."

A similar ruling seems to have been made by the Supreme Court of Tennessee, in the case of *Guion v. Anderson*, 8 Hump. 325.

I have carefully examined the several statutes upon which these decisions were made, and find nothing in them materially different from the saving clause in section 2 of our act of 1831, upon which the rights of the parties in this case are made to depend.

2. The plaintiffs are not helped by the act of July 4, 1846, in relation to the interests of husbands in the estate of their wives. Swan's Rev. Stat. 712. Indeed, there is reason to believe, if we are permitted to look beyond the agreed statement into the evidence filed in the case, that the bar had intervened long before the passage of that act; and it is at least doubtful, from the statement itself, whether a fair construction does not lead to the same result. It shows the defendant's possession to have been continued *more* than twenty-one years; and as the obligation is upon the plaintiffs to bring themselves within the exception, it may be doubtful whether this ambiguity should not operate against them and in favor of the defendant, and authorize us to assume as much *more* as would be necessary to carry the case back of the passage of that law. But the statute has in no manner altered, diminished, or restricted the interest and estate which the husband acquires in the lands of the wife. It is still an estate of freehold, entitling him to the possession, and while his interests alone are in question, may be lost by his laches, as fully and effectually as before the statute was passed. It has very wisely provided that it shall not be conveyed by him, unless she joins in the deed, nor taken for his debts. In other words, it shall not be placed beyond her reach, in case it is needed for her comfortable support, *as it might be if he was [233 permitted to convey, or it was subject to be sold for his debts.

But it is her rights, and not his, the statute was designed to pro-

Lessee of Thompson's Heirs v. Casson. Parks v. State of Ohio.

tect; and as the statute does not take from the adverse occupant the rights the statute of limitations was intended to confer for his protection, we do not feel authorized to deny him the benefit of that protection, unless such a case is made as would entitle the wife to the use of the property as against the husband. While the interests of the husband are alone presented, they must be made subservient to the paramount rights of the adverse occupant.

Judgment for the defendant.

THURMAN, C. J., and BARTLEY, J., dissented.

LESSEE OF THOMPSON'S HEIRS v. DAVID CASSON.

EJECTMENT. Reserved in Licking county.

RANNEY, J. This case is submitted to the court upon the same state of facts, and is brought to recover a portion of the same tract of land, as in the foregoing case of Lessee of Thompson v. Green. The opinion in that case, therefore, disposes of this. There must be a judgment for the defendant.

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*JAMES PARKS v. THE STATE OF OHIO.

It is not essential that the record, of the conviction of a person of the crime of murder, should set out and show expressly that the grand jurors, who returned the indictment, had the requisite qualification of electors of the county.

Where a motion is made for a new trial, in a criminal case, on the ground that one of the petit jurors had, previous to his being called on as a juror, expressed his opinion that the accused was guilty, although, when interrogated in the jury-box before being sworn, he answered that he had neither formed nor expressed any opinion on the subject: it is essential that the motion should be supported by an affidavit, showing that the fact of such objection was *unknown*, either to the accused or his counsel, at the time the jury was impaneled.

Parks v. State of Ohio.

MOTION for the allowance of a writ of error.

The case is stated in the opinion of the court.

H. Griswold, for Parks, made the following points :

I. The names of the grand jury which found the indictment must appear on the record, and a plea that one of the members had not the proper qualifications is a good plea. The record must show that the jury was a competent jury.

II. One of the petit jurors was disqualified because of his having previously formed and expressed an opinion as to the guilt of the prisoner. In order to obtain a new trial, it is sufficient to show that such disqualification existed at the time when the jury was impaneled. It is not necessary, on the motion for a new trial, to show, by affidavit, that the prisoner had no knowledge of its existence at the time. In a criminal case, a defendant can not waive his right to a trial by a *full* jury; neither can he, by mere silence, waive his right to a trial by twelve *competent* jurors.

*BARTLEY, J. This is an application for the allowance of a [235 writ of error, to reverse the judgment of the court of common pleas of Cuyahoga county, on an indictment against James Parks, alias James Dickinson, for the crime of murder in the first degree. At the December term of the court of common pleas of Summit county, Parks was convicted on the same indictment, and sentenced to the punishment of death. This judgment having been reversed, on writ of error, in the Supreme Court, and the cause remanded for further proceedings, the venue was changed, and the cause transferred to the common pleas of Cuyahoga county. At the February term, 1855, of the court last mentioned, the cause was again tried, and the accused convicted of the crime of murder in the first degree. And application is now made for the allowance of a writ of error, to reverse the judgment of the common pleas of the county of Cuyahoga, upon the following grounds:

1. That the record does not show that the grand jurors, by whom the indictment was found, had the requisite qualifications of electors; and,

2. That the court of common pleas overruled a motion for a new trial, founded on the fact that one of the petit jurors had, previous to his having been called as a juror, expressed his opinion that the accused was guilty.

It is true, that the statute requires, that the grand jurors should

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have the qualification of electors of the county; and although it is essential that the record, in a criminal case, should disclose the names of the grand jurors, by whom the indictment was found, it is not requisite that this statutory qualification of the jurors should be alleged. It has been held, that the fact of the want of this qualification in the grand jury, might be set up as a defense, by way of special plea. 17 Ohio. This defense not being involved in the issue made by the plea of not guilty, it must precede that plea, and can only be made available by special plea. After a verdict for the state, on the plea of not guilty, as in this case, the accused can not 236] go back and make a question, in *regard to the qualification of the grand jurors, not apparent on the record.

The other error assigned, is, that the court of common pleas should have granted a new trial, on the ground, that one of the petit jurors had, previous to his having been called on as a juror, expressed his opinion that the prisoner was guilty. The motion for a new trial, however, was not supported by any evidence, showing, by affidavit or otherwise, that the fact of such objection to the juror was unknown to the defendant or his counsel, at the time the jury was impaneled. The defendant was bound to avail himself of every objection to the jurors known at the time of the impaneling of the jury; and he could not be allowed to reserve an objection of this kind to a juror, until after verdict against him, and then make it a ground for a new trial. For this reason, it was essential, in order to make this objection to the juror available on the motion for a new trial, that it should have been shown, by affidavit or otherwise, that the objection was unknown, either to the accused or his counsel, at the time the jury was impaneled.

The allowance of the writ is therefore refused.

JOHN SIDLE v. JOHN MAXWELL ET AL.

The object of the statute requiring the record of mortgages, being notice to persons other than those who are parties to the instrument, a mortgage may be valid and binding as such without record, as between the parties to the instrument.

The execution of a mortgage is the act of a mortgagor, but the filing it for
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record is exclusively the act of the mortgagee, not requiring the assent of the former, and not in reality a part of the execution of the instrument.

The language of the court in the case of *Holliday v. The Franklin Bank of Columbus*, 16 Ohio, 533, declaring "that the delivery of a mortgage for record is a part of the execution of the instrument, and that, before the filing *for record, a mortgage has no validity, either in law or in equity," [237 must be received with the qualification that it has exclusive reference to the effect of the instrument as to those not parties to it.

THIS is a proceeding in chancery, in which, among other things, partition of certain real estate is prayed for, and the question of the validity of a mortgage on the premises presented.

The heirs of Ann Robinson, deceased, and also Daniel Heltzler, are made defendants; the former as the owners of the fee of the undivided fifth part of the lands in question, and the latter as the holder of a mortgage lien upon the same interest. It appears that Heltzler was the holder of a note against James Robinson, the husband of said Ann Robinson, deceased, for two thousand dollars, on which John White, deceased—the ancestor of said Ann, from whom said lands descended to her—had been security. And in order to release the administrators of the estate of White, and enable them to make final settlement without paying the note, Heltzler consented to the erasure of White's name from the note, and took, in lieu of the personal security, this mortgage, executed by James Robinson and his wife, the said Ann Robinson, dated May 30, 1846. It was acknowledged, at the time of its date, in due form, except that, in the certificate of the wife's acknowledgment, there occurred an omission of the words, "*by me, separate and apart from her said husband.*" Thus acknowledged, the mortgage was delivered for record on the 3d, and recorded on the 4th of June, 1846. Immediately after the record, the omission in the justice's certificate was discovered; whereupon Robinson and wife re-acknowledged the execution of the mortgage before the same officer, who adopted his former certificate, by interlining the words omitted, and changing the date from the 30th of May to the 2d of June; and as thus acknowledged, the mortgage was not recorded until the 15th of December, 1850, which was after the death of Ann Robinson. *It appears that the land was held in the right of Ann Rob- [238 inson, and descended to her heirs; and the whole controversy submitted for decision here, relates to the validity of the mortgage against the heirs of Ann Robinson, deceased.

Wm. White, for Daniel Heltzler, one of the defendants, made the following points:

I. A mortgage is good against the mortgagor without being recorded. The law, providing that a mortgage shall take effect from the time of delivery for record, construed with a view to its object, has reference to the rights and claims of third persons, and not to the parties to the instrument. This proposition is not inconsistent with the former decisions of the Supreme Court. *Lake v. Dond et al.*, 10 Ohio, 415; *Stansel v. Roberts*, 13 Ohio, 148; *Mayham v. Combs et al.*, 14 Ohio, 428. The case of *Holliday v. Franklin Bank of Columbus et al.*, 16 Ohio, 533, affirms the points decided in *Mayham v. Combs et al.* The manifest meaning of the judge, delivering the opinion in *Holliday v. Franklin Bank*, is apparent from the decision in *White v. Denman*, made at the same term. 16 Ohio, 59; 1 Ohio St. 112. The recording of the instrument can in no sense be said to form part of its execution, as *between the parties*, although it may reasonably be regarded as incomplete, until made public by record, as to the rights of third persons. In this sense, its record may be said to form part of its execution. 19 Vin. Abr. 512; 1 Dallas, 434; *Purdon's Digest*, 163, sec. 8; *Leving v. Will*, 1 Dallas, 450; 4 Dallas, 153; *Purdon's Digest*, 172; 13 Serg. & Rawle, 167; Conn. Stat. 390, 391; 14 Conn. 46; 4 Kent's Com. 168-171.

II. If an unrecorded mortgage be operative as a conveyance, so as to create an incumbrance on land against the mortgagor, while living, it will be equally so against his heirs at law, after his decease. *Bond's Lessee v. Swearingen*, 1 Ohio, 311; *Piatt v. St. Clair's Heirs et al.*, 6 Ohio, 227, 238-240.

239] *III. The execution of the mortgage and its delivery to the mortgagee invest him with authority to cause it to be filed for record at any time. From the time of its filing, it becomes as effectual against the heirs as it would have been against the ancestor, if he had been living. Such authority, being a power coupled with an interest, is not limited for its execution to the life of the author, and is irrevocable. *Bergen v. Bennett*, 1 Caine's Cas. in Er. 1; *Hunt v. Rousmaniere's Adm'r*, 2 Mason, 244; 1 Parsons on Contracts, 60, 61; 2 Kent's Com. 643, 644, side pages; *Knapp v. Alvord*, 10 Paige's Ch. 208; 23 Pick. 330, 332, 333.

IV. The only examination of the wife authorized and required of the officer taking the acknowledgment, by the statute, is one sepa-

rate and apart from her husband. Where the officer certifies that she was *examined*, and the contents made known to her, etc., it is to be presumed that the examination certified to have been made was a separate one. *Stevens v. Doe ex dem. Henry*, 6 Blackford, 475; *Watson v. Clendenin et al.*, *Ib.* 477; *Lessee of Ward v. Barrow*, 2 Ohio, 241.

BARTLEY, J. The only question for determination in this case is that of the validity of the mortgage, as between the heirs of Ann Robinson, deceased, and Heltzler, the mortgagee. The claim that the mortgage is ineffectual, is founded on the supposed construction heretofore given to the statute of 1831, and the amendatory act of 1838, which declare "that mortgage deeds shall take effect, and have preference, from the time the same are delivered to the recorder of the proper county for record." Rev. Stat. 310, 311.

If the mortgage were operative against Ann Robinson in her lifetime, it must be equally so against her heirs; for, so far as the inheritance is concerned, the heirs stand in the shoes of the ancestor, and can take no other interest or estate than that which she possessed; and if the mortgage was valid to her, they are estopped by her deed.

*Every statute must be construed according to its intent, [240 and with reference to the mischief to be prevented, and the remedy provided. The manifest object of the statute requiring the record of mortgages, is *notice* of the incumbrances created; and of course, this notice has reference to persons other than those who are parties to the instrument. No sensible object could be accomplished in subjecting persons to the expense of this public record, with a view of notice to the parties themselves. The provision of the statute, therefore, declaring that mortgages shall take effect and have preference from the time of their delivery for record, has reference to the rights of persons other than the parties to the instruments, and was designed to regulate and fix with certainty the priority of right among incumbrances. The expression which has been used in some of the reported decisions in this state, "that the delivery of a mortgage for record is part of the execution of the instrument," is not strictly correct. All the decisions in which this language is used, determine simply the effect of the mortgage in relation to its giving a preference over other lienholders. The case of *Holliday v. Franklin Bank of Columbus et al.*, 16 Ohio, 532, in which the

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language of the court in this respect is the most unguarded, and most needs qualification, simply determines that a mortgage, previous to its delivery for record, has no effect, either at law or in equity, against a subsequent judgment. The result of all the decisions on this subject is, simply, that a mortgage does not take effect as a recorded instrument, or, in other words, does not take effect in giving any priority over subsequently acquired liens, until it is delivered for record. In reality, the delivery of the mortgage for record is not a part of the execution of the instrument. The requisites for the execution of mortgages are especially prescribed in the statute. The execution and acknowledgment of a mortgage is the act of the mortgagor—the delivery of it requires the concurrence of the mortgagor and the mortgagee; but the filing it for record is exclusively the act of the mortgagee. Indeed, by the express 241] *language of the statute, the instruments required to be recorded are *executed* mortgages. The execution and delivery of a mortgage are intended to divest the mortgagor of his estate, and the recording of the mortgage to give notice to the world of its existence. So that a mortgage is valid and binding as such without record, *as between the parties to the instrument*. And the delivery of it for record being exclusively the act of the mortgagee, not requiring the assent of the mortgagor, or being in reality any part of the execution of the instrument, it will become operative as to third persons only when delivered for record, although such delivery be after the death of the mortgagor. In the case of *White v. Denman*, 16 Ohio, 59, it was held, that although an instrument of writing defective in its execution, as a mortgage, by having but one subscribing witness, could not be set up to defeat a subsequent lienholder, yet, that as between the parties to the instrument, it will be regarded in equity as a good and valid mortgage. The mortgage in question, therefore, is a good and valid instrument against the heirs of the mortgagee, Ann Robinson.

Decree in favor of Daniel Heltzer, and cause remanded for further proceedings.

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ERNESTINE SCHEFERLING (BY HER NEXT FRIEND) v. WILLIAM HUFFMAN ET AL.

An ante-nuptial contract entered into in Germany, according to the laws of that country, by which the husband, for a valuable consideration, agreed that all the property of the intended wife, which she then owned, or which they might mutually acquire during coverture, should be the property of the wife, is not contrary to the policy of our laws, and will be enforced in this country.

Such property can not be taken on execution in this country to satisfy the debt of the husband.

Upon a bill in chancery, filed by the wife, by her next friend, for the purpose of enjoining a creditor of the husband from selling such property on execution, the court will, by injunction, restrain such sale.

*BILL IN CHANCERY; reserved in Montgomery County. [242

This bill is filed to restrain the sale of chattels, taken in execution as the property of the husband of the complainant, upon a judgment in favor of Huffman. She claims that the property is hers by virtue of an ante-nuptial contract, entered into in Germany by her and her husband, before they emigrated to this country, a translation of which contract is here inserted :

[HESSIAN REVENUE STAMP.]

OBERNKIRCHEN, *March 31, 1838.*

Present, the assessor of the court—Gleim.

At our court-house appeared the miller and tenant, Henry Christopher Scheferling, from the windmill at this place, a native of Colshorn, district of Burgdorf, and kingdom of Hanover, thirty-two years old, as the betrothed of Ernestine Ebeling, widow of the windmiller Kunnecke, forty-two years old, and also from the windmill at this place, and stated as follows:

Voluntarily, and without compulsion, we have resolved to enter into a matrimonial connection; and whereas,

1. My (Scheferling's) right to acquire property, and also that I am tenant at this place, is certified to in Appendix I; and whereas,

2. My (Scheferling's) father, the old father Heinecke, Christopher Scheferling, at Colshorn, has given his consent to this marriage, my mother being dead—all of which will appear from Appendix II; and whereas,

3. My (Ernestine's) mother, the unmarried Wilhelmine Ebeling, No. 9 at Rolfshagen, has also given her consent to this marriage, as will appear from Appendix III; and whereas,

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4. The appointment of a guardian for my (Ernestine's) children by former marriage, in the person of the master saddler, Dietrich Trebein, and also the demise of my husband some eighteen months ago, is known to the court from the guardian's docket; and whereas,

5. The payment of the entrance money by me (Scheferling) appears from Appendix IV, and the payment of the hospital tax from Appendix V; and whereas,

6. There exists no consanguinity between us:

Therefore, we pray that this notice of our marriage may be confirmed by the court.

In regard to our property we agree as follows:

1. That if I (Scheferling) should die first, my affianced (Ernestine) shall inherit all my property; but if, at the time of her death, there shall be children or descendants living from this marriage, she shall not deprive them of said property.

2. That if I (Ernestine) should die first, he (Scheferling) shall receive annually for his support, and in full satisfaction for all claims for property acquired during our marriage,

243] *a) The little by-house, for a residence;

b) The use of the piece of land on which the by-house stands;

c) Annually 20 himten of rye, weighing each from 48 to 49 pounds;

d) Two himten of wheat, each from 53 to 54 pounds;

e) Nine himten of barley, 42 pounds each;

f) Twenty pounds of peeled barley;

g) Twenty pounds of groats.

If he, however, shall marry again, all these uses shall cease from the day of such marriage; and, in that case, he shall receive—

a) One hundred thalers, if we should have been married five years;

b) Two hundred thalers, if we should have been married ten years; and

c) Four hundred thalers, if we should have been married fifteen years, and no more.

Besides this, he shall have the use of his own property, but he shall not deprive the children which we may have of the same; and he shall have no claim whatsoever upon my (Ernestine's) own property, nor upon that which we may acquire during our marriage.

Finally, I (Ernestine), in order to prevent contentions between my children of the two marriages, declare it to be my will that all the property I own at present, and all the property which may be acquired during the continuance of this marriage, shall, after my decease, be divided in equal shares between my children of the first and of this marriage.

Saddler Trebein, the guardian of the children of the first mar-

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riage, was present at the above declaration, and approved the same in all respects.

Read and approved.

C. SCHEFERLING,
KUNNEKER,
DIETRICH TREBEIN,
Mark X X X of the mother
of Ernestine.

Subscribed and closed *est supra*.

In fide.

[Signed] A. GLEIM,
[Signed] PH. DUNTZ.

The prayed-for confirmation of the court is, *salvo jure tertii*, hereby granted *eod quo supra*.

{ Seal of Justiciary Court of Obernkirchen, Elec- torate of Hessen. }	Justiciary Court of the Electorate. A. GLEIM, PH. DUNTZ.
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Seen and approved by the Ecclesiastical Court, Obernkirchen,
April 16, 1838. E. MEYER, *Pastor*.

By agreement of counsel, certain questions touching the validity of the above contract were referred to the counsel for the *Electorate of Hessen, at New York, who gives his opinion [244] in writing, as follows:

"Ante-nuptial agreements are permitted, by the German law, to alter or modify the common rules concerning property, hereditary rights, and succession. If made as this agreement, such changes or modifications are irrevocable by the one party, without the consent of the other. Stipulations as to the acquisitions of the married couple becoming the property of the wife are lawful, and may be enforced in the German courts."

Conover and Craighead, for complainant, made the following points:

I. The validity and construction of the ante-nuptial contract are to be determined by the laws of the country where it was made. *Wilcox et al. v. Hunt*, 13 Pet. 178; *Bank of United States v. Donnelly*, 8 Pet. 361; *Blanchard v. Russell*, 13 Mass. 1; *Story's Con. Laws*, sec. 242, and cases cited; *Deconche v. Savatier*, 3 Johns. Ch. 190; *Story's Con. Laws*, sec. 145, *a*, secs. 276, 277, 278.

II. By the laws of Germany, where it was made, it was valid, and irrevocable by either party, without the free consent of the other.

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III. By the express terms of this contract, the complainant was to be, during her natural life, and surviving her husband, as exclusively as before marriage, the owner of all the property which she had at the time of marriage, and all the acquisitions of the married life; if this be not expressly provided, yet any other ownership of the property is utterly inconsistent with what is expressly agreed between the parties. When, from the terms of the gift, settlement, or bequest, the property is expressly, or by just implication, designed to be for the wife's separate and exclusive use, the intention will be fully acted upon. Story's Eq. Jur., sec. 1381.

IV. If she did not retain the exclusive ownership, still she 245] *has such an interest and estate in the property during her life, with power of disposition at her death, that the property can not, against her will, and in the absence of fraud on her part, be subjected to her husband's separate debts.

V. Change of domicile does not invalidate the contract, but, being an express agreement as to the present and future, it will be enforced by the courts of this state, unless it be against the policy of our laws, in the meaning attached to that phrase by the courts. Story's Con. Laws, secs. 222, 246, 258, 259, 183, 184, 185, 187, and note, secs. 178 and 143; Decouche v. Savatier, 3 Johns. Ch. 190.

VI. Complainant has not voluntarily abandoned her rights under the contract; has not been guilty of active or passive fraud generally, or to respondent Huffman in particular; she was not a party to, or cognizant of, the contract between her husband and Huffman, and did not induce the credit to her husband. If she is to be deprived of her property in spite of this ante-nuptial contract, it must be by the mere stern operation of the policy of our laws, and without wrong or fraud on her part.

VII. This contract is not, in the accepted sense and force of the phrase, against the policy of our laws, but it is in accordance with the common law, and especially with the spirit and tendency of modern legislation, and decisions in this country and state, in reference to the separate rights and property of married women. Story's Eq. Juris., secs. 1378, 1379; Reeve's Dom. Rel. 162, note 2, and authorities there cited; Story's Eq. Juris., secs. 1380, 1381; Reeve's Dom. Rel. 162, 163, note 1, 164, 172, note 2, and cases cited; Merrit v. Lyon, 3 Barb., N. Y., 110; 13 Peters, opinion, pp. 594, 595; 10 Ohio, 371; Magniac v. Thompson, 7 Pet. 349; Reeve's Dom. Rel. 176, note, and cases cited; Ib. 165, 166; Meth. E. Church v. Jaques,

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1 Johns. Ch. 450; Same case, 3 Johns. Ch. 1, and 77; 18 Johns 548; Hardey v. Green, 12 Beaven, 182; 13 Jurist, 77, cited in 7 Harrison's Digest, 711 (Sup. vol. 3).

**T. I. S. Smith and Haynes & Howard*, for defendant, made [246 the following points:

The agreement entered into by the complainant and her husband does not vest in her the acquisitions of her husband; by it she could have no property in them during his life. Everything that is contracted for is upon the event of the death of one or the other of them. It seems clearly to be in the nature of a testamentary disposition. If it was the purpose of the parties to prevent the husband from acquiring any property, to make him his wife's servant, without any wages, that purpose should appear without any doubt. 2 Story's Equity, 608. If such a purpose were clearly expressed, a court of equity would hardly enforce the contract. 2 Story's Equity, 602.

If the contract is in the nature of a testamentary disposition, it can have no effect upon the husband's acquisitions, so long as he and his wife are living, and simply disposes of what each has at the time of his or her death. The law of their domicile fixes the ownership of whatever is held or acquired by them, and that vests all in the husband, and is subject to the claims of his creditors.

There may be an interest for life in chattels, which is a right to the use only. But the use of such chattels as grain, hay, and fruit consists in the consumption. The use and the property can not exist separately. The right to the use of such things is, therefore, an absolute property in them. 2 Kent's Com. 353. Nearly all the property taken in this case was of that description.

The ante-nuptial contract has been abandoned and abrogated. The evidence disclosed in the testimony proves most strongly that the parties did not regard the contract as in force, when the levy was made. In equity, a married woman's agreements with her husband are held valid, and may be enforced. 2 Story's Equity, 601. Her rescission of such a contract as this should then be held valid.

*By our law, a promise in consideration of marriage must [247 be in writing, and signed by the party to be charged therewith, or it is void. This contract, though made in a manner more solemn,

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is not according to our law, not being signed by either of the parties, and should not be enforced in our courts.

It ought not to be held operative here, because it is against the policy of our laws. Story's Con. Laws, 158, sec. 182; Ib. 95, sec. 9; Ib. 85, sec. 87; Ib. 33, sec. 33; Ib. 29, sec. 28. By the policy of our laws, man is the head of our family, and has the charge and control of its affairs; all acquisitions of property vest in him. The right to acquire and hold, is an important incentive to industry and exertion. Here it is taken away entirely. Scheferling had sold himself. It may do in Germany for a man to place himself in such a position, but when he becomes an American citizen, he should be emancipated, whether he will or not.

KENYON, J. William Huffman obtained judgment in the court of common pleas of Montgomery county against Henry Kunnecke and Henry Scheferling, for about five hundred dollars, loaned to Kunnecke, for the payment of which money Henry Scheferling was in fact but surety.

An execution was issued on this judgment, and the sheriff levied upon various articles of personal property, consisting of horses, cattle, etc., as the property of Henry Scheferling. The bill in this case was filed by Ernestine Scheferling, by her next friend, against her husband, Henry Scheferling, William Huffman, the judgment creditor, and others, claiming that the property thus levied upon was her property, and not that of her husband, and praying that the court might so decree, and enjoin Huffman from making sale of the property.

Huffman answers, denying that the property belonged to the wife, and claiming that it in fact belonged to Henry Scheferling, and was liable to be taken in execution for his debts.

Testimony was taken in the case on both sides, and on the 248] *hearing in the common pleas, the court found the equity in the complainant, and decreed a perpetual injunction. The defendant, Huffman, appealed, and the case was reserved by the district court of Montgomery for the decision of this court.

In support of the complainant's exclusive claim to the property levied upon, she introduced and proved by proper evidence, that, in the year 1838, she entered into an ante-nuptial contract with her present husband, Henry Scheferling.

This contract was duly entered into before the proper court in

Germany, and was valid and binding in that country. The question of its validity in Germany was, by agreement of counsel, submitted to the German consul at New York, who decided that this was a legal and binding contract where made. The validity and interpretation of contracts are to be governed by the laws of the country where made.

When this contract was entered into, Ernestine was a widow of forty-two years of age, and her husband, Henry Scheferling, a man of thirty-two. She had property to the amount of several thousand dollars; he had little or no property. She was the mother of five children by her first husband.

The contract, after reciting the various facts making it lawful to marry, has, among others, the following provisions: "In regard to our property, we agree as follows: 1. That if I, Scheferling, should die first, my affianced Ernestine, shall inherit all my property, but if, at the time of her death, there should be children or descendants living from this marriage, she shall not deprive them of said property. 2. That if I, Ernestine, should die first, he, Scheferling, shall receive annually for his support, and in full *satisfaction for all claims for property acquired during our marriage*, (a) the little by-house for a residence; (b) the use of the piece of land on which the by-house stands; (c) annually twenty himten of rye, weighing each from 48 to 49 pounds; (d) two himten of wheat, each from 53 to 54 pounds; (e) nine himten of barley, 42 pounds each; (f) 20 pounds of peeled barley; (g) 20 pounds of groats. If, however, he should marry *again, all these uses [249 shall cease from the day of such marriage, and in that case he shall receive (a) one hundred thalers, if we should have been married five years; (b) two hundred thalers if we should have been married ten years; (c) four hundred thalers, if we should have been married fifteen years, and no more. Besides this, he shall have the use of his own property, but he shall not deprive the children which we may have of the same; and he shall have no claim whatsoever upon my (Ernestine's) own property, nor upon that which we may acquire during our marriage. Finally, I, (Ernestine,) in order to prevent contentions between my children of the two marriages, declare it is my will, that all the property which may be acquired during the continuance of this marriage, shall, after my demise, be divided in equal shares between my children of the first and this marriage."

The first question made on this contract is to determine its proper construction. It is claimed by the respondents, that this contract relates only to a disposition of the property at the time of the decease of either or both the parties; that the contract relates to property which may be in existence at the time of the death of one or the other of the parties, and not to the title during marriage. We think such is not the proper construction of this agreement. It is provided that if she should die first, he shall receive certain things, in full satisfaction for all *claims for property acquired during marriage*; and again, if she should die first, and he marry again, he should receive so many thalers, but should have no claim *whatsoever* on her (Ernestine's) own property, nor upon that which they might acquire during their marriage. It is very evident from this contract, that if Henry Scheferling had the power under it to dispose of Ernestine's own property, and the property acquired during marriage, the whole object of the contract would be defeated, and there might be nothing left of any kind, and the contract might as well not have been made. The language of the contract gives her, in equally as strong language, the control and disposition of the property acquired during marriage as of her own property; and 250] for his relinquishment of *that property*, if she should die first, a full satisfaction was provided for him in consideration of such relinquishment. But, in construing this contract, we do not feel it necessary to determine to whom belongs the property which he might acquire during marriage with her own means exclusively.

When the parties came to this country, he had little or no property. She had several thousand dollars in money, with which were purchased real estate, and the title; to take that, Scheferling should have a fee simple estate in an undivided portion of the land after the death of Ernestine. She made the contract; she had the money and took the deed, according to her views of propriety and right; her money purchased all the personal property, such as household furniture and farming utensils, etc.; and if his labor should, to a certain extent, be mixed up in some of the products of the farm, which have been seized in execution, it is very evident that her own money and means are also mixed with his labor, and that she has some interest in these articles, which are proposed to be sold as his property. It is property which they acquired by her means and his labor, and which, we think, upon a fair construction of this contract, belongs to her exclusively.

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It is however claimed, that by the sale of the by-house, etc., in Germany, and the conduct of the parties in this country, it may be fairly inferred that they had abandoned the agreement. We are well satisfied, from the whole of the evidence, that the parties intended no such thing; that he considered her the owner of all the property, by virtue of the original contract, and consulted her, and, indeed, was wholly governed by her in all his sales and purchases; that he accounted to her for all the property he sold, of every kind, and that she furnished the money to make all the purchases.

Nor do we perceive that the execution of this contract in this country, according to the original intention, would interfere at all with the policy of our own laws.

*Henry Schoferling, when he entered into this contract, [251] was capable of making such a contract. He considered that he had procured a sufficient consideration for agreeing to give her the whole of her own property, and all the property which they should mutually acquire during the marriage. He is still satisfied with that contract, and no good reason can be assigned why such contract should not be fully carried into execution as between the parties themselves.

Our conclusion is, that the property levied upon belongs to Ernestine.

Decree of injunction accordingly.

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A plaintiff can not sustain a motion to rule out the defendant's testimony, by evidence in reply to it.

A correct judgment will not be reversed, because a bad reason for it was given by the court that rendered it.

A decree in chancery may be as effectual a bar to an action or defense, at law, as would be a judgment at law.

But to make the dismissal of a bill a bar, it must have been upon the merits of the case, and not merely for want of prosecution.

Where the question is whether a bill was dismissed upon the merits, or for want of prosecution, and the ground of dismissal is not stated, nor anything found in the record from which it may be inferred there is no presumption either way; the consequence of which is, that, as it must be established

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that the dismissal was upon the merits, and that fact is not shown and can not be presumed, there is no bar.

But where it appears that a dismissal was upon a *hearing* of the case, it is to be inferred that it was upon the merits.

A judgment will not be reversed, because an erroneous instruction was given to the jury, unless the record discloses some evidence tending to show that the instruction was material.

The question whether an instruction was correct or not, may become immaterial, owing to the finding of the jury.

252] *ERROR to the district court of Miami county.

The action below was assumpsit, brought March 13, 1851, by the plaintiff, Loudenback, as indorsee, against the defendant, Collins, as maker, of five promissory notes—two of which were drawn payable to William B. Spears, or bearer, and the others, to Chester Shattuck, or bearer.

To the declaration, which was in the common form; the defendant pleaded non-assumpsit, with a notice that he would prove on the trial that the notes were fraudulently obtained from him by the payees, respectively, for Burger's patent cross-cut saw, for the states of Virginia and Tennessee; and that the said patent was wholly valueless; of all which the plaintiff was fully cognizant at the time he received said notes from the payees; that the plaintiff was not a bona fide indorsee, but took all said notes with notice that the same had been obtained by fraud upon the defendant, as aforesaid.

On the trial in the district court, the jury found for the defendant; and the court, after overruling a motion of the plaintiff for a new trial, gave judgment upon the verdict. Two bills of exception were taken by the plaintiff—one in the progress of the trial before the jury, and the other upon the overruling of the motion for a new trial.

The first of these bills, omitting the formal parts, is as follows:

"The plaintiff having given in evidence the notes on which the suit was brought, and the defendant having adduced proof tending to show that the notes were given for patent right territory, which patent-right was worthless; and that the execution of the notes was fraudulently procured by Shattuck and Spears, the payees in said notes and assignors of the plaintiff, the plaintiff moved the court to rule out the testimony offered by defendant, for the reason that the same matters of defense had been before adju-

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licated between the parties, and that that adjudication estopped the defendant from setting up his present defense—and, in support of the motion, the plaintiff offered the record of the [253] suit of James Collins (defendant in this case) against David Loudenback, Chester Shattuck and William B. Spears, in Champaign common pleas, in chancery, which is made part of these exceptions, marked A. But the court held and decided, that the defendant was not debarred or estopped by said former proceeding and record, from making his present defense, and therefore overruled the motion of the plaintiff to rule out defendant's testimony. Whereupon the plaintiff excepts."

The chancery record above referred to, shows that on January 9, 1849, Collins filed his bill against Loudenback, Spears, and Shattuck, charging, among other things, that the notes hereinbefore mentioned, had been obtained from him by the fraudulent devices and representations of Spears and Shattuck, and their confederates, upon no other consideration than the assignment to him of a right to use and vend, in the states of Virginia and Tennessee, a certain void patent-right, for a wholly worthless invention, called "Burger's Cross-cutting Saw," or "Burger's Improvement in the Cross-cutting Saw;" and that Loudenback had bought the notes with full knowledge of these facts. The bill prayed, *inter alia*, that the defendants might be enjoined from instituting actions at law upon the notes, and that they might be delivered up and canceled.

Upon this bill a provisional injunction was allowed.

October 8, 1849, the complainant filed a supplemental bill, charging that a paper, purporting to be a settlement of the matters in controversy, had been executed by him, in ignorance of its contents and without any settlement having been made, through the fraudulent devices and practices of an agent of Spears and Shattuck, and praying that it be delivered up and canceled.

January 28, 1850, Loudenback answered, admitting that he had purchased the notes, and that before he did so, he had heard upon what consideration they were given; but denying that he *had [254] any knowledge of the invalidity or worthlessness of the consideration, or of the fraud alleged in the bill; and averring that he was a *bona fide* purchaser, and for a valuable consideration.

To this answer a general replication was filed.

April 22, 1858, Spears and Shattuck answered, taking no notice

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of the allegations of the original bill, but relying on the paper purporting to be a settlement, mentioned in the supplemental bill.

July 8, 1850, exceptions to their answer having been sustained, Spears and Shattuck pleaded said paper, or settlement, in bar. To this plea no replication was filed.

The suit was continued until the October term, 1850, when the following entry, and nothing more, was made: "Injunction dissolved and bill dismissed. Decree against complainant for costs."

The second bill of exceptions, omitting the caption and formal conclusion, is as follows:

"Be it remembered, that on the trial of this cause at the May term of said court, to wit, on May 31, 1853, the evidence having been closed, the court charged the jury, among other things, as follows:

"1. That if an indorsee has received a promissory note before due, and has paid a valuable consideration therefor, having such grounds for suspecting the consideration to be a worthless patent-right as would, or ought to have, put a prudent man upon inquiry, he takes the note at his peril.

"2. That if the jury should find that the plaintiff had obtained the note before due, and had paid value for it, without notice of fraud or want of consideration, and that the note had in fact been procured by the payees from the maker fraudulently and without consideration, the jury would be justified in rendering a verdict for the plaintiff, for the amount he actually paid for the notes, if the testimony showed what that was.

"And thereupon the jury gave their verdict against the 255] *plaintiff. Whereupon, the counsel on the part of the said plaintiff, David Loudenback, moved the court for a new trial, by reason of the supposed misdirection of the said court, so given as aforesaid, to the said jury. But the said judges overruled the said motion, and gave judgment upon the verdict of the said jury, against the said David Loudenback. Whereupon, the counsel of the said David Loudenback made their exceptions," etc.

To reverse said judgment this petition in error was filed

The assignment of errors is—

"1. The court erred in overruling the said motion of the said David Loudenback, to rule out the said testimony of the said defendant.

"2. The court also erred in overruling the said motion for a new trial, and in entering judgment for the said James Collins."

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Young & Leedom, J. A. & I. Corwin, and Warden & Rankin, for plaintiff in error.

Charles Morris, Jr., and *John W. Andrews*, for defendant in error.

John H. Young, for plaintiff in error, made the following points:

Decrees in chancery stand upon the same principles with judgments at common law. 1 Greel. Ev., sec. 551; Swan's Stat. 708. A decree dismissing the bill upon the merits between the same parties, and upon the same subject-matter, without reservation, is conclusive, until reversed. 7 Johns Ch. 286; 5 Ohio, 450; 6 Ohio, 528; 8 Ohio, 214; 4 Johns. Ch. 142; 4 Wash. C. C. 659; 1 A. K. Marsh. 526; 4 Dana, 84.

The bill was, in this case, dismissed, not for want of proper parties, for want of jurisdiction, nor on the ground of informality of the proceedings, nor because of any neglect of counsel on either side. The parties and their counsel were all present, and having submitted the case to the court, the court decide it, dismiss *the [256 bill without any reservation, and decree that Collins pay the costs. Shall it be said, that the court have not decided the whole case?

A *bona fide* holder of a note, for a valuable consideration, before due, without notice of any infirmity, will hold and collect the note, let the infirmity be what it may, even if the payee had acquired it by fraud, or theft, or robbery, even although the consideration be illegal. Story on Prom. Notes, 210, secs. 191, 192, and 193; 6 Mass. 428. Testimony tending to show what the consideration was, with the view of proving that a valuable consideration had not been paid, and that therefore plaintiff was not a *bona fide* purchaser, might have been proper, but for that purpose only, and not to limit the amount of recovery.

The charge of the district court, that "if an indorsee has received a promissory note, before due, and has paid valuable consideration therefor; having such grounds for suspecting the consideration to be a worthless patent-right as would, or ought to have, put a prudent man upon inquiry, he takes the note at his peril," is erroneous. Story on Prom. Notes, 220, sec. 197; Story on Bills, 415, 416.

John W. Andrews, for defendant in error, made the following points:

I. A former recovery may be pleaded in bar, and it may also be given in evidence under the general issue. Where it could not,

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from the nature of the case, have been pleaded in bar, it is equally conclusive in its effect, as if it were specially pleaded by way of estoppel. 1 Greenl. Ev., secs. 828, 829, 830. The record in this case was not offered at all as evidence to go to the jury, but simply in support of the motion to rule out the defendant's testimony. It could not avail the plaintiff for such purpose.

II. If it had been offered in evidence to the jury, it would not have been conclusive against the defendant, as the bill relied upon was filed against the plaintiff and two other persons as defendants, 257] *and was dismissed solely for want of prosecution. A decree or order, dismissing a former bill for the same matter, may be pleaded in bar to a new bill, if the dismissal was upon the hearing, upon the merits. An order dismissing a bill for want of prosecution is not a bar to another bill. Story's Eq. Plead. 610; Mitford's Chan. Plead. 298, and cases there cited; 1 Greenl. Ev., sec. 539. Unless the second bill be filed by the same complainant or his representatives, against the same defendant or his representatives, even a decree of dismissal on the merits in the first case is no bar. Neafie v. Neafie, 7 Johns. Ch. 1; Sawyer v. Bletsoe, 2 Vern. 328.

The jury rendered a verdict for the defendant; the plaintiff therefore has in no way been injured by the second part of the charge of the court to the jury, and has no valid ground for exception thereto.

The first part of the charge of the court below is well sustained by authority as well as upon principle. If an indorsee takes a bill without due caution, and under circumstances which ought to have excited the suspicion of a prudent and careful man, the maker or acceptor may be let in to his defense. Gill v. Cubitt, 3 B. & C. 466; 3 Kent's Com. 84; Beckwith v. Corral, 2 Carr & Payne, 261; Nicholson v. Patton, 13 Louisiana, 213; Ayer v. Hutchins et al., 4 Mass. 37; Thompson v. Hale, 6 Pick. 261; Story on Prom. Notes, 221, note.

The contrary decision, in Lawson v. Weston, 4 Esp. 56, was overruled by Lord Tenterden, in Gill v. Cubitt, 3 B. & C. 466. The rule laid down in the cases of Crook v. Gadis, 5 B. & Adol. 909, and of Backhouse v. Harrison, 5 B. & Adol. 1098, was modified by Lord Denman in 1835, who, in the case of Goodman v. Harvey, 4 Adol. & E. 870, decided, that gross negligence is not alone enough to destroy the title of a holder for value, but that a case of *mala fides* must be made out against the holder, to defeat his claim. This

rule has since been followed in England, and is, undoubtedly, there the law. It has *not however been followed by any court in [258 the United States, and there seems to be no good reason why the rule, as long settled in this country, should be shaken. Whatever the exigencies of the overshadowing commercial policy of England may exact from her courts, in encouraging and stimulating the sale and transfer of commercial paper in the market, there is no reason, in this country, why a purchaser of a promissory note should not be held to reasonable caution and inquiry as to the rights of third persons. The shaving of notes, as a business, needs no stimulus in Ohio. The rule laid down in its charge by the court below, so far as it may have a tendency to check and moderate this species of business, and to compel the men who make their money by it, to pay some sort of regard to the rights of their neighbors, will practically work well in this country.

J. A. & I. Corwin, and Warden & Rankin, for plaintiff in error, replied :

I. What is simply offered in evidence, is necessarily offered to both court and jury, if, in its nature, it is proper for both. The motion, to support which the record was offered, was, substantially, one to instruct the jury as to the effect of evidence. The plea was the general issue, with notice; no replication was proper. It was in reply to the defense—so to speak—that the record was offered, and nothing remained but to declare its legal effect on the defense set up. That legal effect was to render the defense unavailing.

The language of the decree neither says, nor imports, that the dismissal was solely for the want of prosecution. It must be construed to be the action of the court on the merits, and is a full bar.

II. The distinction sought to be made between commercial interests and necessities in this country, and the same interests and necessities in England, appears to be wholly unfounded. All wise and prudent regulation of commerce is in favor of the rule *as [259 now firmly established in England. That rule has been recognized here and everywhere. *Cone v. Baldwin*, 12 Pick. 546; Story on Prom. Notes, sec. 197.

THURMAN, C. J. It is quite clear that there is nothing contained in the first bill of exceptions that would warrant a reversal of the judgment. The point meant to be presented by the bill is, whether

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the decree in the chancery suit estopped the defendant to set up the defense specified in his notice. But, in order to raise that point, it was indispensably necessary for the plaintiff to offer the chancery record in evidence to the jury. Had he done so, and had it been objected to and the objection sustained, or had it gone to the jury, and had the court charged that it did not operate as an estoppel, then by a bill of exceptions the point might have been saved. But it was never offered to the jury, and of course there was no refusal to permit it to go in evidence, nor any instruction given in respect to it. The idea that it could be made available, on a motion to rule out the defendant's testimony, is certainly as novel as anything that we have met with, and quite as unsound as it is novel. The jury, and not the court, were the triers of the facts; and to them, and not to the latter, was the plaintiff to adduce his testimony in answer to the defense. And it makes no difference that the question, what was the legal effect of the testimony, might be for the determination of the court, the testimony itself was to go to the jury, subject to the right of the court to instruct them.

But it is said that the court did actually hold that the decree did not bar the defense, and that such an opinion was expressed as a reason for overruling the plaintiff's motion, is certainly true; but how does this aid the plaintiff? The motion was correctly decided, whatever was the effect of the decree; and if the opinion of the court was erroneous, it simply presents a case of a sound judgment with a bad reason given for it. That such a judgment should not 260] be reversed for such a cause, would seem to be too obvious to need the support of authority; but if that is needed, it may be found in abundance. *Steamboat Waverly v. Clements*, 14 Ohio, 37; *Harman v. Kelley et al.*, Ib. 507.

It is hardly necessary to add, that the opinion expressed by the court did not dispense with the necessity of offering the record to the jury, if the plaintiff wished to save his point; but it is to be noted, that the only thing excepted to under this head was the overruling of the motion, and that nothing else is assigned for error based upon the first bill of exceptions. It is very clear, then, for each of these reasons, that this part of the case presents nothing for us to decide but the question, whether the motion was properly overruled. That it was so, is too plain for doubt.

Nevertheless, the repugnance we feel to decide a case upon any other than its substantial merits, has led us to examine the opinion

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complained of; although it could not, for the reasons I have stated, be of any avail to the plaintiff, were we convinced that the opinion is erroneous. But we are not so convinced. On the contrary, the result of our investigation is, that we think it is correct.

There is no question that a decree in chancery may be as effectual a bar to an action or defense at law, as would be a judgment at law; but the question is, when is a judgment or decree a bar? Upon this subject Chancellor Kent, in the well considered case of *Neafie v. Neafie*, 7 Johns. Ch. 4, said: "A bill regularly dismissed *upon the merits*, may be pleaded in bar of a new bill for the same matter; for if the same matter, or the same title, should be drawn into question again by another original bill, it would, as the cases say, 'introduce perjury, and make suits endless.' The cases to this point were referred to in *Perrine v. Dunn*, 4 Johns. Ch. 142. But in the cases I have looked into upon *dismissal of former bills*, the new bill was brought by the *same party who filed the original bill*; and there is said to be a material distinction between a new bill by *such a party* and a new bill concerning the same subject by the *defendant* *in the first suit. To make the *dismissal of the former suit* [261 a technical bar, it must be an absolute *decision* upon the same point or matter; and the new bill, it is said, must be by the same plaintiff, or his representatives, against the same defendant or his representatives."

This doctrine was fully approved by Judge Story, in his Commentaries on Equity Pleading, sections 791-793, and other authorities cited in its support; and he states the rule to be, that "a decree or order dismissing a former bill for the same matter, may be pleaded in bar to a new bill, if the dismissal was *upon the hearing*, and was not, in terms, directed to be without prejudice. But an order of dismissal is a bar only, where the court has *determined* that the plaintiff *had no title to the relief sought by his bill*; and therefore an order, dismissing a bill for want of prosecution, is not a bar to another bill."

If these principles be applied to the case before us, there would seem to be no reasonable doubt, that the opinion of the district court is correct. For, first, the action at law was not brought by the plaintiff in the chancery suit, but by one of the defendants. Secondly—and this, in our judgment, is of much more importance—it does not appear that the bill was dismissed *upon hearing*, or *upon the merits of the case*. There is certainly nothing in the re-

cord to show, what Judge Story says is indispensable, that the court had "*determined that the plaintiff had no title to the relief sought by his bill.*" For aught that is stated, the bill may have been dismissed for want of prosecution; and if it be said that this ought not to be presumed, the answer may well be made, that it ought not to be presumed that the dismissal was upon the merits. We think that, where the ground of dismissal is not stated, nor anything found in the record from which it may be inferred, there is no presumption either way; the consequence of which is, that it must be established that the dismissal was *upon the merits*, and that fact is not shown and can not be presumed, there is no bar. 262] I should perhaps add, to avoid misapprehension, *that where it appears that the dismissal was upon a *hearing* of the case, it is to be inferred that it was upon the merits.

The second bill of exceptions contains two instructions given to the jury, and to which the plaintiff excepted.

By the first of these instructions, the jury were told, "That if an indorsee has received a promissory note before due, and has paid a valuable consideration therefor, having such grounds for suspecting the consideration to be a worthless patent-right as would, or ought to have, put a prudent man upon inquiry, he takes the note at his peril."

It is unnecessary for us to say whether, in our opinion, this instruction was correct or not; for there is not a word of testimony disclosed by the record to make it material. It is not certain that it was in proof to the jury, that the notes sued on, or either of them, had been indorsed to the plaintiff: and it is certain that it does not appear that they were indorsed before due. Nor is it shown that he paid any value whatever for them, nor that, when he purchased them, if he made any such purchase, he had any ground for suspecting what was their consideration. Evidence tending to prove all these matters was necessary to lay a foundation for the instruction; but no evidence is shown, as having been given to the jury, tending to prove any one of them.

That a judgment will not be reversed, because an erroneous instruction was given to the jury, unless the record discloses some evidence tending to show that the instruction was material, is as well settled as any point can be, and has nowhere been more distinctly stated, or constantly acted upon, than in our own courts. See *Creed v. Com. Bank of Cincinnati*, 11 Ohio, 489; *Wash. Mu-*

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tual Ins. Co. v. Reed and Brown, 20 Ohio, 202, 206, 207; Kugler v. Wiseman, Ib. 361; Walker v. Lessee of Devlin, 2 Ohio St. 605.

For the same reason, it is unnecessary to decide whether the second instruction was correct; and also for an additional reason. *This instruction related to the amount the plaintiff would [263] be entitled to recover should the jury find in his favor. They were told that, upon the hypothetical case stated, the proper damages would be the sum he paid for the notes. Assuming that that was less than their amount—although the bill of exceptions contains no proof to that effect—counsel say that the charge was erroneous; and that the proper damages would have been the amount of the notes, with interest. But it is obvious that, as there could be no assessment of damages unless the defendant was found to be liable on the notes, and as the jury found that he was not so liable, it is now wholly immaterial whether the instruction was correct or not.

As the motion for a new trial rested upon the same matters we have herein considered, and on no other, nothing need be said about it.

Judgment affirmed.

JOHN M. BASHFORD v. ANDREW J. SHAW.

In case of guaranty, demand of payment of the principal debtor, and notice of his default, are requisite to charge the guarantor only, where the fact on which his liability is made dependent rests peculiarly *within the knowledge* of the guarantee, or depends on his *option*.

But where the contingency which determines the liability of a guarantor, is one which is known to him, or which he is bound to know, or where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril.

In order to discharge a guarantor from liability, on the ground of want of notice of the default of the principal debtor, there must be, not only a want of the notice *within a reasonable time*, but there must be also some *actual loss or damage* thereby caused to the guarantor. And if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is not wholly discharged, but only *pro tanto*.

*If the principal debtor be solvent when the note falls due, and due [264] notice of the default be not given, and the principal afterward, and before notice, becomes insolvent, the guarantor is discharged.

The continued insolvency of the principal debtor, from the time of the maturity

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of the debt, as a general thing, dispenses with the necessity of the notice, in order to charge the guarantor.

Where the undertaking of the party is to guaranty the payment of the note of another, *after final process*, the prosecution of the claim to final process against the maker of the note is essential, in order to charge the guarantor. But an omission to bring suit against the original debtor, within a reasonable time, will not discharge the guarantor from liability, where the terms of the guaranty do not prescribe the degree of diligence to be used in the proceeding, by suit, and where, in consequence of the continued insolvency of the principal debtor from the time of the maturity of the debt, the guarantor suffered no loss by the delay.

PETITION IN ERROR, to reverse the judgment of the common pleas of Morrow county.

The original action was brought by the plaintiff in error, on the 15th of January, 1853, on the defendant's guaranty of the payment of a promissory note, before George D. Cross, Esq., a justice of the peace, who upon the trial of the cause, rendered judgment in favor of the plaintiff. The defendant appealed. In the common pleas, the plaintiff declared in assumpsit on the following instrument, to wit:

" IBERIA, July 28, 1849.

"On or before the fifth day of March, I promise to pay A. J. Shaw, or bearer, the sum of thirty-five dollars, for value received.
(Signed,) "JOHN BONER."

Indorsed as follows:

"December 8th, 1849. I guarantee the payment of the within note, after final process.

(Signed,) "A. J. SHAW."

The defendant plead non-assumpsit. At the September term of the common pleas, 1853, the parties waived the intervention of a jury and submitted the cause to the court, upon the [265 instrument declared on, and an agreed statement of the facts, as follows, to wit:

"It is agreed in this case, that the defendant, in consideration that the plaintiff had sold him a horse, on the 8th of December, 1849, made the indorsement appearing on the said promissory note; that the note became due on the 5th day of March, 1850

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On the 13th day of January, 1851, Bashford commenced suit on the note against Boner, the maker of the note, before William Shunk, a justice of the peace, and on the 25th of January, 1851, recovered a judgment. And it is further agreed, that at no time after the note became due, could any part of the same have been collected from said Boner, on account of insolvency; and that execution had been issued on the said judgment against him, January 25, 1851, and returned February 20, 1851, 'No goods or chattels found whereon to levy.' And that the present action on the guaranty was commenced on the 15th of January, 1853.'

Upon this state of the case, the common pleas found for the defendant. The plaintiff moved for a new trial, but the court overruled the motion, and rendered judgment for the defendant; whereupon the plaintiff duly excepted to the decision of the court.

Stinchcomb & Brumback, for plaintiff.

Dunn & Gurley, for defendant.

BARTLEY, J. The undertaking of the defendant declared on, in the original action in the court below, constituted a *guaranty* of the payment of Boner's note, after proceedings for the collection of the same had been prosecuted to final process. And the questions which arise for determination are the following:

1. Whether the plaintiff's right of recovery in the court below, could be defeated by want of evidence of *notice* to the defendant of the default of the maker of the note; and, if not,

*2 Whether it was defeated by the delay which occurred [266 in the prosecution of the claim to final process.

Of these, in their order.

1. The rule in regard to demand of payment and notice of the default, required to charge indorsers of negotiable paper, is not applicable to guarantees. In the former, the demand and notice is, by an arbitrary rule of the law merchant, strictly required, as a condition precedent to liability; while, in the latter, the demand and notice of the default of the principal, is a simple duty required of the holder, with a view of saving the guarantor from *actual loss*, which may arise from want of convenient and certain means of knowledge. There are several classes of guaranties, in which demand and notice are not required at all. For instance, where a guaranty is in the nature of a simple security, undertaken origin-

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ally, and with the principal, that a debt shall be paid, or some other act be done, the liability attaches without demand of payment and notice of the default. *Chapin v. Lapham*, 20 Pick. 467. So, where the undertaking is an absolute and independent stipulation to pay the debt of another at all events, no demand and notice is said to be necessary. And in the case of *Bush v. Critchfield*, 4 Ohio, 103, it was held, by the Supreme Court of this state, that where the guarantors had covenanted that their principal should sell and account for all merchandise placed in his hands by the plaintiff, within a stated period, no notice of the non-performance by the principal was necessary. To the same effect is the case of *Douglass v. Howland*, 24 Wend. 35; also, *Hammond v. Gilmore's Adm'r*, 14 Conn. 479.

Demand and notice, however, are requisite to charge a guarantor, where the fact on which his liability is made dependent rests peculiarly *within the knowledge* of the guarantee, or *depends on his option*. But where the fact which determines the liability, is one which the guarantor knows, or is bound to know, or which is equally within 267] the power of both parties to ascertain; in other *words, where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril. *Farwell v. Smith*, 12 Pick. 83, 87; *Davis v. Duvall*, 4 Wash. C. C. 181; also, *Wyse v. Wakefield*, in the Court of Exchequer, 6 Meeson & W. 442. The application of the rule requiring demand and notice, founded on the reasons above mentioned, is cleared of all difficulty, in case of the guaranty of the goodness or collectability of a debt. The contingency upon which the liability is made dependent, rests upon the *action* of the guarantee, and depends on his *option*. The result of his efforts to enforce the liability of the principal, and the period of their termination, are of necessity peculiarly within his knowledge. He is, therefore, reasonably and properly, required to give notice to the guarantor of the default of the principal, before bringing suit upon the guaranty. *Grier v. Ricks*, 3 Devereaux, 62; *Adcock v. Fleming*, 2 Dev. & Bat. 225; *Lewis v. Bradley*, 2 Iredell, 303; and *Sylvester v. Downing*, 18 Vt. 32.

In the cause before us, the engagement of the defendant was the guaranty of payment after final process. This required the plaintiff to prosecute the original liability to final process; and the fact upon which the contingency of the defendant's liability was made to depend, consisted in non-payment after the requisite remedy for

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the collection of the claim had been used. And this, depending upon the action of the plaintiff, left the default, after the termination of the efforts for collection, peculiarly within his knowledge; so that notice to the defendant of the default would have been essential, before his liability could have been enforced, had it not been dispensed with by the circumstance hereafter noticed, which took the case out of the operation of the rule.

The ground, however, upon which notice of the default of the principal is required, in case of guaranty, clearly distinguishes it from the notice required to charge an indorser, in the ordinary case of the indorsement of commercial paper. The latter is entitled to strict notice, without delay, and without regard to *conse- [268] quences. But in case of guaranty, notice of the default is sufficient, if it be given in a reasonable time. In the cases of *Wildes v. Savage*, 1 Story, 22, and *Howe v. Nichols*, 22 Maine, 175, the adjudications on this subject are very fully reviewed, and the doctrine shown to be well settled that, in order to discharge a guarantor from liability on the ground of want of notice, there must be not only a want of notice of the default within a reasonable time, but there must be also some actual loss or damage thereby sustained by the guarantor; and if the loss or damage does not go to the whole amount of the claim, but is only in part, that the guarantor is not wholly discharged, but only *pro tanto*, or, according to the extent of the loss. If the principal be solvent when the note falls due, and the requisite notice be not given to the guarantor, and the principal afterward, and before notice, becomes insolvent, the guarantor is discharged. But where the notice could have afforded no benefit to the guarantor, and he has suffered no actual loss by want of it, he is not discharged by the omission to give it. Where, therefore, the principal is insolvent when the debt becomes due, or where the duty is first imposed on the guarantee to require payment, and continued insolvent, notice to the guarantor, being unnecessary, is dispensed with; and it is said that, in such case, even a demand upon the debtor is not ordinarily required. This doctrine seems to be fully sustained by the leading authorities in England. *Warrington v. Furber*, 8 East, 242; *Phillips v. Astling*, 2 Taunt. 206; *Holbrow v. Wilkins*, 1 Barn. & Cress. 10; and *Van Wart v. Wooley*, 3 Barn. & Cress. 439. In the last case Lord Tenterden said, "That in cases of guaranty, the nature of the transaction, and the circumstances of the particular case, were to be considered and regarded,

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and that, where the debtor had become bankrupt, a demand on him was unnecessary to charge the guarantor." And these cases are full to the effect, that where it does not appear that the guarantor has sustained any damage or loss, either from want of due present-
269] ment to the debtor for *payment, or from the want of due notice of the default, the guarantor is not discharged. The same doctrine is pointedly asserted in the case of the *Oxford Bank v. Hayes*, 8 Pick. 423, and recognized in *Gibbs v. Cannor*, 9 Serg. & Rawle, 202. And the case of *Reynolds v. Douglass*, 12 Peters, 497, decided in the Supreme Court of the United States, is a leading case, to the effect that the guarantor is bound without notice, where the principal is insolvent at the time when the debt becomes due; and that this liability continues, unless the guarantor can show that he has sustained some actual prejudice by the want of due notice of the default of the debtor; and that, if any actual loss has been sustained, he will be discharged only to the amount of damage sustained. This was to the full extent affirmed in the case of *Rhett v. Poe*, 2 How. 484.

The application of this doctrine, therefore, which appears to be founded in reason and well settled by authority, to the cause under consideration, removes all difficulty in the determination of the first point. It is shown, by the agreed statement of facts in the case, that the principal debtor (Boner) was wholly insolvent when the note fell due, and ever afterward remained so. Notice of his default, therefore, became unnecessary, and was dispensed with; and the want of such notice constituted no ground of defense in the court below.

2. Did the delay, which occurred in the prosecution of the claim against the original debtor, interpose any bar to the plaintiff's recovery? The note became due on the 5th of March, 1850, but suit was not commenced on it till the 13th day of January, 1851; being the lapse of a little over ten months after the maturity of the debt. Judgment, however, was taken against him on the 25th day of January, 1851; and, on the same day, execution was issued on the judgment, which, on the 20th day of February, 1851, was returned, "No goods or chattels found whereon to levy." The debt, there-
270] fore, remained unpaid after *final process; so that the contingency occurred against which the guarantor stipulated. But, it is claimed that the suit was not prosecuted against Boner in due time,

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and that, upon this ground, the defendant was discharged from his liability.

It was incumbent on the plaintiff to prosecute the claim against the principal debtor to final process. The terms of the guaranty required this. The stipulation of the defendant was to insure the payment after final process. Nothing could dispense with this proceeding against the principal; for it was essential to produce the event by which, alone, the liability of the defendant could be fixed. But there is nothing in the terms of the guaranty expressly fixing or prescribing the degree of diligence to be used, or the time within which the proceeding should be instituted. Where, by the terms of a contract, however, an act is required to be done, but the time for doing it is not expressly prescribed, the law, by implication, requires that it shall be done within a *reasonable time*.

It is sometimes the case, that the terms of a guaranty fix the degree of diligence to be used, or the time and manner in which the proceedings shall be prosecuted against the principal; and where this is the case, it has been held that the terms of the guaranty must, in this respect, be strictly pursued, otherwise the liability of the guarantor will be discharged. Such appears to be the effect of the case of *Dwight v. Williams*, 4 McLean, 582; also, *White v. Case*, 13 Wend. 543; and *Eddy v. Stanton*, 21 Wend. 255. In the last case, the court say, in their reasoning, that although the principal debtor may be said to be insolvent, yet it is impossible to anticipate the fruits which may arise from the due prosecution of the claim. Property may be discovered, or some friend come forward and satisfy the debt, etc. But in these and other cases referred to, the attention of the court appears to have been directed to the question, whether the legal remedies could, for any cause be dispensed with, rather than the time within which they should be prosecuted.

*But the case before us is clearly distinguishable from the [271 cases referred to. The defendant, in the agreed statement of facts, admitted that *at no time after the note became due could any part of it have been collected from the principal debtor*. The stipulation in the guaranty was to warrant payment after final process. The reasonable time implied for the pursuit of the legal remedy, had relation to all the circumstances surrounding the case. The object in requiring diligence in the proceeding against the principal, was *safety* to the guarantor. And, inasmuch as it was apparent, when the note became due, that nothing could be collected from Boner, a

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delay of a few months in commencing suit against him, operated beneficially to the guarantor, as it was indulgence to him, and afforded time to the principal debtor to accumulate means. There is, certainly, no sensible and substantial reason why this delay should operate to discharge the guarantor. This is not a case requiring the application of the strict and arbitrary rules of the mercantile law, sometimes so essential to secure promptness and vigilance, with a view to certainty and confidence in commercial transactions. And the defendant can not claim for himself the observance of that strictness sometimes allowed in favor of sureties, for his engagement does n't stand upon the consideration of the original debt, but is founded on an independent consideration, for his own benefit. Had the defendant specially stipulated in the contract for diligence on the part of the plaintiff in commencing suit against the maker of the note, or had he specially directed it to be done, he might, with some reason, insist on the non-compliance by the plaintiff as a ground for his discharge. Or had the defendant suffered loss by the delay in the proceeding against the maker of the note, he would certainly be entitled to a discharge from his liabilities—so far, at least, as he had been damnified. But since he has been in nowise whatsoever prejudiced by the delay, there exists no just and substantial reason for his discharge from his liability on this ground.

272] *We are of opinion, therefore, that there is error in the proceedings of the court below.

Judgment of the common pleas reversed, and the cause remanded for further proceedings.

SHERMAN, J., dissented.

EXECUTORS OF FREDERICK HAYMAKER, DECEASED, v. ANDREW HAYMAKER.

In the absence of any express statutory provision on the subject, section 6 of the statute of limitation of 1831, is to be construed so as to cover a case under the administration act; where the claimant commences suit within six months after the rejection of his claim by the executor, and after the expiration of the six months the judgment is reversed, or the plaintiff becomes non-suited.

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The fact that the nonsuit was occasioned by the failing of the plaintiff to give security for costs, does not withdraw the case from the operation of the statute, so construed.

Where the declaration contains several counts, the first of which avers the original contract-liability of the defendant's testator to the plaintiff, the bar by the statute of limitations, and a subsequent promise to pay within six years before the commencement of the action; the second of which avers that, in consideration of the work and labor of the plaintiff previously done and performed by the testator—without averment that it was done at the request of the testator—the testator promised to pay the plaintiff what the work was reasonably worth, it is no error for the court to charge the jury that the plaintiff may recover under the second count, not for the labor, but upon the promise made in consideration of such labor.

There is no bar to an action, unless pleaded, and it would be requiring too much to ask the plaintiff to foresee which defense will be made, and to anticipate the statute of limitations. The better practice in such case is to make the issue of the subsequent promise by replication.

Under a count, framed on an executed consideration, and averring the original indebtedness and a subsequent promise in consideration thereof, but failing to aver that the claim had ever been barred by the statute of limitations, evidence will be admitted that the claim was barred, but taken out of the statute by a subsequent promise.

***PETITION IN ERROR, to reverse a judgment of the district [273 court of Trumbull county.**

The case is stated in the opinion of the court.

Sutliff & Tuttle, for plaintiffs in error, made the following points :

I. So far as the claim made in the present case is concerned, the statute requiring non-resident plaintiffs to give bail for costs (Swan's Stat. 651, old edition), is still in force. The statute of executors and administrators having been enacted subsequently to this statute, the provisions of its 90th section as much require bail to be given within six months by a non-resident, as they require suit to be commenced within six months. The effect and substance of the 90th section are, "shall commence a suit, in manner as required by law, or be barred forever," etc.

The object of the statute is to put the administrator in a position to have the claim determined without concession by him. Until bail for costs is given by non-residents, the administrator has not been placed in a position where that can be done. As to all the

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objects to be gained by the statute, it is the same as though no suit had been commenced.

The statute certainly contemplates more than the mere commencement of a suit; it must be prosecuted as well as commenced; and the failure to prosecute—such as in this case—is as fatal as the failure to commence. *Spalding v. Butts et al.*, 6 Conn. 28.

II. It is a well-established rule of pleading, that what an averment of declaration in regard to the nature of a consideration for a promise means in legal construction, that must be proved in support of the averment.

The language of the second count of the plaintiff's declaration is of an established and determinate legal meaning; it no more means, that a promise has in fact been made after the performance 274] *of the labor, or at any other time, than the formal request in the conclusion of an assumpsit count means a real request. To consider it as making a case for proof of such a promise made, after the statute has run against the original liability, is to go counter to the doctrine of *Hill v. Henry*, 17 Ohio, 9-13.

Upon all rules of construction the necessary effect of our statute, as to a suit after the statutory period, is either that no action at all can be maintained, or else that it can only be on the new promise. *Ibid.*, *Marcy, J.*, in 3 Wend. 141; *Spalding, J.*, in 20 Ohio, 335. The case of *Turner v. Moore's administrator* has been supposed to establish a contrary doctrine, 20 Ohio, 332; but the remarks of the court in that case go to show, that the point decided is against principle, even as there decided. The court expressly decide, that the case of *Hill v. Henry*, does not bear at all on the questions arising in the case under consideration. That case, says Judge Spalding, "Owes its decision to the peculiar phraseology of section 5 of the act of 1831."

III. The charge of the court, that if the plaintiff had during the period after his majority and preceding the year 1826, done any labor for the defendant's testator, which had not been paid for nor satisfied, the promise of the testator at any time after it was done to pay for it would create a liability to pay for it, is erroneous and opposed to authorities as well as to reason. The subsequent promise creates a legal obligation, when there is a previous legal or moral obligation to pay, and not otherwise.

IV.. The judgment of the district court, that the damages and costs be levied of the assets of the testator in the hands of the ex-

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ecutor, and the special mandate to the court of common pleas to carry the judgment into effect, are erroneous. Swan's Stat. 378, sec. 95.

No other argument came to the hands of the reporter.

KENNON, J. Andrew Haymaker, the plaintiff below, in an action of assumpsit brought against the defendant below, filed a *declaration, containing three counts. The first, in sub- [275 stance, alleged that, in 1823, he entered into a contract with the testator, by which he agreed to serve the testator for three years, in consideration of which services the testator promised to convey to the plaintiff fifty acres of land, in Portage county; that the plaintiff performed the labor; that the testator refused to make the deed, and afterward conveyed the land to a stranger; that afterward, and after the statute of limitations had barred the plaintiff's claim, and within six years before the commencement of this suit, the testator promised to pay the plaintiff for his services.

The second count alleged, that in consideration of the work and labor of the plaintiff, before that time done and performed for the testator (without any averment that it was done at the *request* of the testator), of the value of \$800, the testator promised to pay the plaintiff what the work and labor was reasonably worth; and the plaintiff averred that it was reasonably worth \$800.

The third count contained all the common counts in one, in the usual form.

The defendants pleaded, firstly, non-assumpsit; secondly, the statute of limitations; and thirdly, a special plea, averring that the plaintiff had presented the claim, upon which the action was brought, to the executors for their *acceptance* or *rejection*, according to the statute in such case made and provided, and *requested* the executors to *approve* the same, but that the executors rejected the claim; and that this suit was not brought until more than *six months* after such rejection.

To this special plea the plaintiff replied, that he had brought another action within six months after the rejection of his claim by the executors, and that he was non-suited by the court in said action; and that afterward, and within six months from the time of said non-suit, he had brought the present action.

To this replication the defendants rejoined, that when the *plaintiff brought the first action, he was a non-resident of [276

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the county of Trumbull, and that he was ordered by the court to give security for costs, within forty days, or become non-suited; and that he failed to give such security, and in consequence thereof was non-suited.

To this rejoinder the plaintiff demurred, and the district court sustained the demurrer.

On the trial of the issues of fact to the jury, the plaintiff, to sustain the issue on his part, proved that he was the son of the testator, and became of age in 1822; and further gave evidence tending to prove the several allegations in the first count in his declaration, and that the plaintiff labored for the testator from 1822 to 1826. The evidence of labor offered by the plaintiff was confined to a period previous to, and including, the year 1826; and the plaintiff gave evidence tending to prove that the testator, within six years before the commencement of the suit, promised to pay the plaintiff's claim. The defendants, to sustain the issue on their part, gave evidence tending to prove that the plaintiff had made no such agreement, as alleged in the first count of the plaintiff's declaration, and also tending to disprove that the plaintiff labored for the testator any such period, after arriving at the age of twenty-one years; and also tending to rebut the plaintiff's evidence, that the testator had subsequently promised the plaintiff, for the land or labor; and also gave evidence tending to prove that the testator had sold the said land in 1834, with the knowledge of the plaintiff.

The parties having closed the evidence, the defendant's counsel asked the court to instruct the jury, that the plaintiff could not recover on the first count, unless the several allegations of the making of said original contract of service and the performance thereof, and the subsequent promise, were proved to the jury; and that for any service less than three years, performed as aforesaid, he could not recover under the other counts in the declaration, unless his *original right of action* for such labor had accrued 277] *within six years before this suit was commenced. But the court refused thus to charge the jury, if the plaintiff *had not proved the allegations in his first count*, he could not recover *thereon*; but that, under the second count in the declaration, the plaintiff might recover, if he had proved any amount of service done by the plaintiff for the testator, at any time after arriving at the age of twenty-one years, for which the plaintiff had not received payment or satisfaction, if the testator had, in consideration of such labor or service,

contracted or promised the plaintiff to pay him for the same if such contract or promise was made within six years before the commencement of this suit. That, in such case, the plaintiff might recover, not for the original labor, but upon the promise made in consideration of the labor.

To refusing to charge the jury as requested, and to the opinion of the court in the charge, the defendants excepted, and caused the bill of exceptions to be made a part of the record.

The jury found that the testator did assume and promise, within six years before the commencement of this suit, in manner and form as the said plaintiff had alleged, in the first and second counts in the declaration, and assessed the damages at \$402, for which judgment was rendered.

The plaintiffs in error assign, in their petition, three causes, for either of which they claim the judgment of the district court should be reversed.

1. It is claimed the court erred in sustaining the plaintiff's demurrer to their rejoinder to the plaintiff's replication.

2. That they erred in charging the jury that the plaintiff might recover, *under the pleadings*, for any labor done by the plaintiff for the testator, for which the right of action was barred by the statute ment of limitations.

3. That the court erred in charging the jury, that if the plaintiff had, after arriving at majority, performed any labor for the testator for which he had not received payment nor satisfaction, *and [278 the testator had at any time afterward promised to pay for the labor, the plaintiff might recover on that promise.

There is also a fourth error assigned, that the court rendered judgment and ordered the same to be levied of the assets of the testator, in the hands of the executors. As to this last error, upon looking to the record, we find the judgment is in the usual form, and means only that the money is not to be levied of the *property* of the executors, but of the property of the testator; and execution is not ordered to issue on the judgment, but it is simply remanded to the court of common pleas, to be carried into execution as all other judgments are. If the judgment had been rendered against the executors without adding the words, "to be levied of the property of the testator," it might, and probably would have been, erroneous; but we think the judgment is in the proper form.

As to the first error assigned, whether the court should have sus-

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tained the demurrer to the rejoinder, this depends upon a construction of our statutes of limitation.

By section 98 of the administration act, it is provided that no action shall be brought against an executor or administrator until after eighteen months from the date of the letters of administration, or the further time allowed by the court for the collection of the assets of the estate, except in certain cases therein named; one of which cases is provided for in section 90 of the same act. This section provides that if a claim against the estate of any deceased person be exhibited against the executor or administrator, and shall be rejected by him, if the debt be due, the claimant shall, within six months after such rejection, *commence* a suit for the recovery thereof, or be forever barred from maintaining an action thereon; and a claim shall be deemed disputed or rejected if the executor or administrator shall, on presentation of the vouchers thereof, refuse, on demand made for that purpose, to indorse thereon his allowance of the same as a valid claim against the estate.

279] *It will be perceived that by this section no provision is made to save the rights of a claimant who shall have commenced his suit within the six months, and after the expiration of six months shall become nonsuited; nor is any such provision made for a case where the suit shall abate, or where the plaintiff shall obtain a verdict and the judgment be arrested, or where judgment shall be rendered in favor of the plaintiff, and the judgment shall be reversed for error. In neither of these cases is any provision made, in *express terms*, authorizing another action to be commenced at any time after the expiration of the first six months.

There is, however, a provision in our statute of limitations which provides, that if any action be commenced within the time limited by *this* act, judgment shall be reversed or arrested, or the suit abate, or the plaintiff become *nonsuited*, until the time limited, as aforesaid, shall have expired. The plaintiff may commence a new action within one year after such arrest or reversal of judgment, nonsuit, or abatement of action, and not after. See Swan's Stat. (old), 555, sec. 6.

This last act took effect June 1, 1831, and was in force at the time of the passage of the act providing for the settlement of the estates of deceased persons.

It will be seen, from the reading of these two acts, that neither of them provide, in express terms, for the case in which an action

has been brought against an executor or administrator who had rejected a claim, and suit is brought within the six months prescribed by the statute, but after the expiration of the six months the judgment is reversed, or the plaintiff becomes nonsuited.

It is very clear that the legislature intended, by our general statute of limitations, that the plaintiff should not lose his debt, if he commenced his action before the bar was complete, and afterward, and after the statute had run, he should be nonsuited by order of the court, but should have one year thereafter in which to commence a new action.

There is no reason why the rights of a party should be saved *in the one case, and not in the other; and the only question [280] is whether the equity of the provisions of our statute of limitations can be extended beyond its express provisions, so as to provide for a case under the administration law, where the claimant must commence suit within six months, and actually does so, and afterward becomes nonsuited, or his judgment is reversed.

Section 4 of the statute of James provided that if, in any of the said actions or suits (meaning the actions or suits mentioned in the English statute of limitations), judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill. The plaintiff in such cases may commence a new action within one year, and not after. See Angell on Limitations, 402. The English statute extended by its terms to only two cases, viz: arrest of judgment, and reversal or writ of error; our statute extends to nonsuits and abatement of the action.

Under the English statute, if an action had been commenced within the six years, and by the death of one of the parties the action abated, the statute has been so construed that a new action may be commenced, though the six years have expired. In such cases, however, the action must be commenced within a *reasonable time*, and that reasonable time has been held to be one year, the courts following the equity of the views of the legislature in cases of arrest or error. And such may be considered the settled law in England and the United States. See Angell on Limitations, 404, 405, and authorities there cited. It will be observed that these decisions are based upon a construction of statutes wherein no saving is made for the abatement of an action by death or otherwise.

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It has, however, been almost uniformly held that when the plaintiff became nonsuited, no new action could be brought, but this was 281] always under a statute where there was no saving in *case of nonsuits. Our statute expressly saves the right of the plaintiff in case of nonsuit, and allows him one year thereafter in which to bring his action. On the principles of the decided cases, where the statute made no provision for nonsuits, we think we would be safe in saying that if in this case the plaintiff had in his first suit obtained a judgment against the defendant, and that judgment had afterward on writ of error been reversed, the plaintiff should at least have a reasonable time in which to commence a new action, and that reasonable time would be six months, the time allowed by the statute in which to bring his original suit after the claim was rejected; but since our statute extends to nonsuits as well as reversal on error, the same reason would require a court to construe the statute to apply to nonsuits in cases like the present. The question whether this was a voluntary nonsuit, and whether the statute can be so extended as to include voluntary nonsuits, does not arise in this case, for the reason that, so far as we can see, it was anything but a voluntary nonsuit; it was made on the motion of the defendant, and was ordered by the court. The fact that it was ordered because the plaintiff had not complied with the statute in giving security for costs, is no more the fault of the plaintiff than any other error which he or his counsel might have committed on the trial of the case, by which the judgment might be arrested or reversed. We think, therefore, that the defendant's rejoinder was no legal answer to the replication, and that the court did not err in sustaining the demurrer.

We ought, however, to observe on this point, that we have examined the case referred to by counsel for the petition in error, found in 6 Conn. 28, and, although we have not been able to find the statute upon which that decision was based, we find the provisions of the Connecticut statute of 1849 are almost a copy of ours, with the single exception that it saves the right of a creditor who may *sue* before the expiration of the six months, and there is no other saving clause in the act.

282] The case, according to the opinion of Judge Peters, might well have been decided on the point that the second action was not for the same cause of action for which the first was brought. The

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first suit seems to have been debt on a record; the second was an action of account going behind the judgment, and the judge says: "But the actions are not for the same matter, cause, or thing, as claimed by the plaintiff's counsel. One is debt, the other account; and they have no more effect on each other than *trover* and *ejectment* for the same *land*." It could in no sense be considered a continuation of the first action. We do not consider the case in point.

The second error assigned being that the court erred in charging the jury that the plaintiff might recover under the *pleadings* for any labor done by the plaintiff for the testator, for which the right of action was barred by the statute of limitations, is intended to raise the question whether the declaration must not count upon the new promise, making the original and barred liability the consideration for such promise. Now, the first count in the declaration is precisely such count: it states the original legal liability, the bar, and the subsequent promise, within six years before the commencement of the action; and the court charged the jury that if the plaintiff had not proved the allegations in the first count, the jury could not find for the plaintiff on that count. The court, as to that count, charged in substance as asked, and charged correctly. But the court further charged, "That under the second count in the declaration, the plaintiff might recover if he had proved any amount of service done by the plaintiff for the defendant's testator at any time after arriving at the age of twenty-one years, for which the plaintiff had not received payment nor satisfaction, if the testator, in consideration of such labor, promised the defendant to pay him for the same, if such promise was made within six years before suit brought; that the plaintiff might recover, not for the labor, but upon the promise made in consideration of such labor." It is true that this count does not aver *that the original labor [283] was performed at the *request* of the testator, but is a common count for work and labor. No advantage could be taken to the count for the want of such averment, except by demurrer; and a court of error will presume that it was so found by the jury, unless the contrary appear.

So far as the evidence is set forth in the bill of exceptions, we can not fail to see that it was all, on the part of the plaintiff, given to prove a special contract made by the parties for the services of the plaintiff; that it was not the intention of the court to charge the jury that a *request* of the testator, either express or implied,

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was not necessary to enable the plaintiff to recover for work and labor performed for the testator. That was not the point in the mind of either court or counsel. The real point was whether, if the claim was barred by the statute of limitations before any promise was made by the testator, which, if made before the bar, would have reversed the cause of action, a recovery could be had on any other than the first count in the declaration. In other words, was either of those last counts so framed that in case the plaintiff failed to prove the first count, he could recover on either of the others upon a promise made after the bar, and within six years before the commencement of the action? To this point alone was the attention of the court directed, and not whether it was necessary to prove an *original request* to perform the services. The court charged that a recovery could be had on the second count, although the plaintiff might fail to prove the first count, and although the promise was made after the plaintiff had been barred by the statute of limitations. Taking the testimony offered by the plaintiff, the plain fact, as it appears by the testimony offered by the plaintiff, that he had but one course of action—the point which was in fact before court when the charge was given—the fact that the jury found, under the first count, that the labor was performed at the testator's *request*, and upon a contract, we are not able to see that the defendants either were, or could have been injured by the charge, so far 284] as an original request to do *the labor is concerned, or that the jury could have at all been misled in supposing that the court intended to charge them that it was not necessary that the labor should originally have been performed at the request of the testator.

We think the defendants could not have been prejudiced by this charge; and that the judgment ought not, therefore, to be reversed on that account.

It is also claimed that the court erred in their instruction to the jury, that a recovery might be had on the second count of the plaintiff's declaration, although the claim had been barred by the statute of limitations before the promise to pay was made.

The question raised by this assignment of error is, whether the count is so framed as to admit evidence that the claim had been barred by the statute of limitations, and that in consideration of the prior indebtedness, a promise was made to pay the claim.

It is supposed that the charge that a recovery might be had as

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such, on this count, is contrary to the ruling of the Supreme Court in the case of *Hillers v. Henry*, 17 Ohio, 9.

The court in that case held that a cause of action could not be revived by a promise made after the bar, but that the original indebtedness was a sufficient moral obligation to sustain a subsequent promise.

This second count is framed on an *executed consideration*, and alleges in substance that the testator was indebted to the plaintiff for the work and labor of the plaintiff, before that time performed for the testator; and that, in consideration of that indebtedness, he promised to pay what the work was really worth. There is no averment that the claim had been barred before the promise. Otherwise the count would be sufficient in all respects. The plaintiff proved that the testator promised within six years. The defendants claim that he ought not to be permitted to prove a promise made so *lately*, but were of opinion that wherever a count on an account stated would have lain before the bar, or where the common count upon an executed consideration for work *and [285] labor, would have lain before the bar, that on these two counts at least, a recovery may be had after the bar, founded upon the subsequent promise; that the form of the two counts, the one before and the other after the bar, must be very nearly the same, and that the court did not err in this particular.

Indeed it may be well doubted whether, in any case, unless upon a bond or sealed instrument, the plaintiff ought to be required to anticipate the defense of the defendant. There is no bar unless pleaded, and it would be requiring a good deal, to ask the plaintiff to foresee which defense will be made, and anticipate the statute of limitations. The better practice in such case would be to make the issue of the subsequent promise by replication.

Upon the whole, we think there was no error in the case, and the judgment is affirmed.

NATHAN HARRIS v. COLUMBIANA MUTUAL INSURANCE COMPANY.

The appropriation of a part of the insured building to the trade of coopering, in violation of the conditions and by-laws, annexed to and made a part of the policy (and which provide that such misappropriation shall, *ipso facto*, render the policy void), avoids the policy; and when it is shown that such forbidden trade was actually carried on, the breach of the conditions and by-laws is complete, although the trade was not carried on for such a length of time as to become "permanent or habitual."

It seems that, where the condition of a policy renders it void if the building is appropriated or used for any trade, or for storing any goods denominated extra-hazardous, the carrying on such trade, temporarily, for the purpose of ordinary repairs, or the introduction into the building of the articles so denominated, to be used for ordinary repairs, or to be consumed in domestic or family use, does not avoid the policy, and the insurers are, notwithstanding, liable; and it is in these, and the like cases, that courts have said that the trade or use, etc., is not "permanent or habitual."

286] *THIS case was reserved from Columbiana county. It was before this court in 1849, on demurrer to the bill, and is reported in 18 Ohio, 116; and the demurrer was then overruled. It now comes before the court for hearing on the bill, answer, replication, and testimony.

The facts of the case material to the question decided, are stated in the opinion of the court.

Mason and Potter, for complainant, cited—

Shaw v. Robberds, 33 Eng. C. L. 12; *Gates v. The Mad. Co. Mut. Ins. Co.*, 1 Seld. 469; 2 Greenl. sec. 408; 16 Bac. Sup. Ct. 119; *Stebbins v. The Globe Ins. Co.*, 2 Hall N. Y. 632; *Dobson v. Sotheby et al.*, 22 Eng. C. Law, 260; *Meriam v. The Mad. Mut. Fire Ins. Co.*, 21 Pick. 162; *Col. Ins. Co. v. Lawrence*, 10 Pet. 507; 1 Ohio St. 471; *Angel on L. Fire Ins.*, secs. 67, 146, 188, 190, 192; 1 Phil. on Ins., sec. 874.

W. K. Upham, for the defendant, cited 3 Exch. 535; 21 Pick. 162; 1 Phil. on Ins., sec. 1035, sec. 10; 16 Ohio, 148; 6 Adol. & E. 75; 2 Hall, 589; 2 M. & W. 472; 2 Comst. 43; 2 Denio, 75.

J. R. SWAN, J. The only question we deem it necessary to con-

sider in this case is, whether the policy became void by the appropriation of the building insured to other purposes than those mentioned in the policy.

The property described in and covered by the policy, is a "brick flouring-mill and engine-house, steam-engine, with all the machinery thereto attached and belonging, necessary for manufacturing flour with steam power, situate," etc. The insurers covenant, in terms, "according to the provisions of their act of incorporation, by-laws, and conditions annexed, to settle with and pay to Harris all losses and damages which may happen," etc., during the time the policy shall remain in force.

*One of the by-laws annexed to the policy is as follows: [287 "If the insured shall alter or enlarge a building, or appropriate to other purposes than those mentioned in the policy, so as to increase the risk, the same shall, *ipso facto*, become void: provided that, in case of such alteration, enlargement or change of use, if the insured shall, within sixty days, and previous to any occurrence of loss on the property insured, give notice thereof to the clerk, the policy may be renewed by the board of directors on such terms as they shall deem equitable."

The conditions annexed to the policy contain a subdivision of goods, etc., into three classes—not hazardous, hazardous, and extra-hazardous. "The following trades and occupations, goods, wares, and merchandise, are denominated extra-hazardous: . . . coach-makers, . . . coopers, . . . *Memorandum*.—Grist-mills, fulling-mills, and other mills, . . . will be insured at special rates of premium."

During the existence of the policy, and on the 20th July, 1845, the premises were destroyed by fire. For the period of about three months before, and down to the time of the fire, the mill had not been running. It had been undergoing some repairs. The repairs, however, had been finished about one month before the fire occurred. The fire commenced in the third story, about midnight. It was seen in the third story before the flames burst out upon the roof, and articles were taken from the second story after the fire had commenced. No fire was kept at the mill; no one slept there. The plaintiff had slept there some weeks before, but had removed his furniture from the mill, and lodged at a public house a short distance from the mill. He was seen leaving the mill on the night previous to the fire, after sundown. The bolting cloths were not in

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the mill when it was burned down. These facts do not justify the court in believing that the mill was set on fire.

During a part of the three months previous to the fire, the plaintiff 288] and his son were engaged in the business of making tubs *and churns in the third story of the mill. The quantity made is not proved, nor would such a fact, in general, be susceptible of proof. One of the plaintiff's witnesses thinks the plaintiff made a dozen or so wash-tubs, but does not know the quantity. Two witnesses of the defendant purchased tubs of the plaintiff, and one of them says that Harris worked at coopering as it was ordered; coopered now and then, as people wanted the articles; on a few occasions to pass time; manufactured tubs and churns for sale; and was not there, probably, more than half of the three months. There were piles of staves and a considerable quantity of shavings sometimes, in the third story, where he and his son worked.

It appears, from the proof, that Harris and his son manufactured tubs and churns, in the third story of the mill, for a few weeks before the fire, and Harris sold the wares he manufactured. Proof of the quantity of the articles manufactured may be an important element in determining whether the *trade* was actually carried on, when there is an absence of all proof of the sale of the articles or the object for which the articles were manufactured; but when there is, as in this case, satisfactory proof that the articles were manufactured to sell, and that the extent of the manufacture and trade was only limited by the amount of the orders received for the articles, the quantity manufactured is of little or no consequence.

It is insisted that the *trade* must be carried on for such a period of time, and in such manner, as to be habitual or permanent. This may in some cases be true, but not to the extent, nor, in general, is the rule applicable in the sense claimed by the counsel for the plaintiff.

In 2 Greenleaf's Ev., sec. 408, the general rule is stated, that "The change of use must be habitual or of a permanent character. Thus, where the policy was on premises 'where no fire is kept and where no hazardous goods are deposited,' a loss occasioned by making a 289] fire *once* on the premises and heating tar, for the *purpose of making repairs, was held covered by the policy. And where a kiln, used for drying corn, was upon *one* occasion used for the more dangerous process of drying bark, whereby the building took fire and was consumed, the underwriters, on the same principle, were held.

liable." As authority for this statement, he refers to the cases of *Dobson v. Sotherby et al.*, and *Shaw v. Robberds*.

Upon an examination of the tar-barrel case, *Dobson v. Sotherby et al.*, 22 Eng. C. L. 260; it will be found that the building insured was of a kind which required the use of tar to repair the roof. The roof required tarring, and a tar-barrel was brought into the building, and the tar there heated by a fire, for the purpose of performing the necessary operation. The court did not decide the case upon the fact that a fire and tar were introduced into the building upon *one* occasion, but say, "That the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose, connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises," etc.

The rule to be deduced from this case is, that although the policy forbid fire to be kept, or hazardous goods to be deposited in a building, such stipulation was not intended to cover, and does not cover, fire or hazardous goods necessary to make ordinary repairs, and used on the premises for that purpose.

The other case cited by Greenleaf is *Shaw v. Robberds et al.*, 33 Eng. C. L. 12; and was as follows:

The plaintiff insured a granary, etc., and "kilo for drying corn, in use." The condition of the policy was that, "If a building contain a kilo, or any process of fire-heat, other than the ordinary risk of common fires in private houses, the same must be noticed in the policy; and that if the risk of fire to which such building is exposed be by any means increased, such *increase of risk [290 must be immediately notified and allowed by indorsement on the policy, otherwise the insurance as to such buildings or goods will be void." The kilo was used for drying corn, and for no other purpose. A vessel laden with oak bark was sunk, and the owner of the bark was permitted by the insured, as an act of kindness and gratuitously, to dry the bark in the kilo for drying corn. No notice of this was given to the insurers. The fire in the kilo for drying the bark was not larger than that usual in the case of drying corn. While the bark was drying, and on the third day after the commencement of that process, the kilo and all the premises took fire and were consumed. The jury found that the trades of drying bark and drying corn were different; that the drying bark

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was the more dangerous; and that the fire was occasioned by drying it. The court say: "Perhaps if the plaintiff had made any charge for drying this bark, it might have been a question for the jury, whether he had done so as a matter of business, and whether or not he had thereby (although it was the first instance of bark drying) made an alteration in his business within the meaning of that condition. But according to the evidence, we are clearly of the opinion that no such question arose for the consideration of the jury; and that this single act of kindness was no breach of the condition." No rule of law is to be drawn from this case. It is simply the shipwreck of principle upon the generous impulses of the court. It was a case of hardship on the plaintiff, who had suffered for his kindness, and seems to be so regarded in England. 46 Eng. C. L. 19, note. It will also be observed that there was no provision in the conditions of the policy relating to an alteration of the trade; but it was clear that the risk of fire had been increased, for it was so found by the jury; and one of the conditions of the policy distinctly provided for increased risk by fire.

It seems to be settled that where the condition of a policy renders it void, if the building is appropriated or used for any 291] *trade or for storing any articles denominated hazardous or extra-hazardous, the temporary use, or the carrying on temporarily, of any of the trades so denominated, for the purpose of ordinary repair, or the articles so denominated are introduced into the building to be used in ordinary repairs, or to be consumed in domestic use, the insurers are, notwithstanding, liable. *O'Neil v. Buffalo Ins. Co.*, 3 Comst. 122.

So, the carrying on the trade and business of soap manufacturing, although extra-hazardous, yet the making of soap by a family, from spoiled meat, on one or more occasions, would not come within a condition forbidding such a business or trade. *Gates v. Mad. Co. Mut. Ins. Co.*, 1 Seld. 479.

Courts, in speaking of the trades forbidden by the condition, and to distinguish them from repairs, etc., have said of the one, that it was temporary, and of the others, that they were habitual or permanent. But if, from this language, it is to be supposed when a building is actually appropriated to a trade forbidden by the condition, that it must be so long carried on that it becomes habitual or permanent, would be grounding a principle upon mere words. For instance, if the insured opens a drug store in one of the rooms

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as the insured building (it being a forbidden trade), must the trade become habitual or permanent before the condition is broken? Surely not. So, if the insured take the steps necessary to carry on the forbidden trade; does sufficient to show that he intends to manufacture for and sell to the public; begins to manufacture upon the premises, so that the risk actually commences, he can not excuse himself from the consequences of his own deliberate act, by showing that he carried on the trade but a short time, or that sufficient time had not elapsed for the trade to become permanent. If the insured, at the request of a neighbor, or for his own household, make an article which the forbidden trade usually manufactures, this would not forfeit his policy. It is not what the condition of the policy intended to cover. But if, as in the case now before the court, the insured manufactures the articles of the forbidden trade for the public, and for gain, to the extent which the market demands, the question of habit or permanence does not arise, and he at once forfeits his policy, according to the condition and by-laws annexed thereto.

Bill dismissed.

RANNEY, J., being a member of the insurance company, did not participate in the hearing or decision of this cause.

ELIZABETH DORAH'S ADMINISTRATOR v. JOSEPH DORAH'S EXECUTOR.

The death of a widow, to whom an allowance has been made under sections 45 and 46 of the administration law, before the expiration of the year, and before it has all been expended in her support, does not bar the right of her executor to recover the amount unpaid, from the executor of her husband. Such allowance confers a vested right of property, and is not divested by her death, or by any other contingency, occurring after the amount has been fixed and allowed by the proper tribunal.

Whether, upon petition for such cause, the amount might be diminished by the probate court, under section 48—*quare?*

CASE reserved in Muskingum county.

The amended declaration counted on an indebtedness in the lifetime

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of the plaintiff's intestate, from the defendant as executor, in the sum of two hundred dollars, "for money then and there, by the appraisers of the estate of the said Joseph Dorah, deceased, certified to be necessary for her, the said Elizabeth Dorah's, twelve months' support, from the death of the said Joseph Dorah, deceased, she being his widow," etc.

The defendant interposed the following special plea :

"And the said defendant comes and defends the wrong and 293] *injury, when, etc., and says that the plaintiff ought not to maintain his action against him as to the said sum of \$200, first mentioned in the plaintiff's declaration; because, he says, that although the appraisers of the estate and property of Joseph Dorah, deceased, did, on the 15th day of March, 1852, at the county aforesaid, set off to, and allow, said Elizabeth Dorah the sum of \$42.87, in certain articles of personal property, and did certify that the further sum of \$157.13 was necessary for the support of the said Elizabeth Dorah for twelve months after the death of her said husband, Joseph Dorah, who died on the 1st of March, 1852; yet the said Elizabeth Dorah died on the 24th day of March, 1852, without reducing the same to possession, or any part thereof, and without taking any steps therefor, except as to said sum of \$42.87, in property, and the sum of \$15.50 paid said Elizabeth by this defendant. And the said defendant avers that said sums of \$42.87 and \$15.50, making \$58.37, were sufficient to support said Elizabeth Dorah during the time she lived after the death of her said husband, Joseph Dorah; and this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to maintain his action against him, etc.

"And for further plea in this behalf, after leave of the court first had and obtained, the said defendant says, that as to said sum of \$200, first mentioned in plaintiff's declaration, the said plaintiff ought not to maintain his action against him; because, he says, that although the appraisers of the estate and property of said Joseph Dorah, deceased, did on the 15th day of March, 1852, in accordance with the statute in that case made and provided, set off and allow to the said Elizabeth Dorah, the sum of \$42.87, in certain articles of personal property, and did certify that the further sum of \$157.13 was necessary to support the said Elizabeth Dorah for twelve months after the death of her said husband, Joseph Dorah, on the 24th day of March, 1852; yet the said Eliza-

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beth Dorah died on the 24th day of March, 1852, without having reduced the said allowance so made by the appraisers *afore- [294 said, for her first year's support ~~as~~ aforesaid, to possession, or any part thereof, and without taking steps therefor, or demanding the same, or any part thereof, except the sum of \$42.87, in property, and the further sum of \$15.50 paid by this defendant to the said Elizabeth Dorah. And the defendant avers that said sums of \$42.87 and \$15.50, making together the sum of \$58.37, were sufficient to support the said Elizabeth all the time she lived after the death of her said husband, Joseph Dorah, and to pay the funeral expenses, and expenses of the last sickness of the said Elizabeth Dorah; and this the defendant is ready to verify. Whereupon he prays judgment if the defendant ought to maintain his action against him," etc.

To this plea the plaintiff demurred.

S. Chapman, for plaintiff.

F. A. Seborn, defendant, in person.

RANNEY, J. Whether the special plea, interposed as a bar to this action, is sufficient, must depend upon the construction of several sections of the administration law. By section 45, it is made the duty of the appraisers to set off, from the property of the decedent, provisions or other property sufficient to support the widow, and children under fifteen years of age, if any, for the period of one year. If there is not sufficient personal property, or property of a suitable kind, they are required by section 46, to certify what sum, or what further sum, in money is necessary for the support of such widow and children for that time; and in either case, the property or money, thus set off and allowed, is to be returned in a separate schedule, and not included in the general inventory. The court to which it is returned, is authorized, upon the petition of the widow, or other person interested, to review the allowance, and increase or diminish the same, and make such order as it shall deem right and proper. By section 83, the executor or administrator is required to *pay the sum thus certified, or [295 ultimately fixed by the court, next after paying the funeral expenses, those of the last sickness, and the expenses of administration, and before anything is applied to the payment of other claims. In this case, no application was made to the probate

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court to increase or diminish the allowance; and, consequently, the action of the appraisers was final. But it is averred in the plea, and admitted by the demurrer, that enough of the allowance was paid to support the widow until her death; and the question now arises, whether the balance may be recovered by her personal representative.

After a careful examination of the subject, we are of opinion that it may be; or, at least, that the plea is no bar to the present action. A different construction would often lead to serious difficulties, and, as it seems to us, would be interpolating into the statute a contingency never contemplated by the legislature. In cases where sufficient personal property, of a suitable kind, exists, from which the allowance is taken, it is undeniably clear, that it goes immediately into the hands of the widow, and is disposed of at her pleasure, and as her absolute property. In fixing the amount, in all cases, the children dependent upon her for support, are taken into the account; so that the death of a child might raise the same question as the death of the widow. We can see no reason to suppose, that it was ever intended to allow a recovery back of any part of the amount, upon the happening of such a contingency; and quite as little, that it was intended, where the property of the estate does not admit of the appropriation of specific articles, to place the widow in a worse situation, by making such an unequal and unjust discrimination. To allow such a deduction, either by giving an action to the administrator to recover it back where it has been paid, or by permitting him to withhold it where it has not, is to introduce the most perplexing uncertainty as to the rights of the widow and the duties of the administrator, and to withdraw the whole matter from the appropriate tribunal, to the assessment and discretion of a jury.

296] *With the construction we adopt, the rights and duties of all concerned are clear, definite, and fixed. It gives to the widow and children a paramount claim upon enough of the estate to support them for one year, over creditors and distributees; and where it has been fixed or set apart by the appraisers, or by the court on review, effectually withdraws it from the balance of the estate, and has all the force and effect of an adjudication in their favor. It confers a vested right of property, conclusively disposes of so much of the estate, and leaves no discretion to the administrator as to complying with it, and no responsibility upon him, to creditors or distributees, for thus complying. In the language of the statute, it is

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"set off" from the estate, and "allowed" to the widow and children. The case of *Adams v. Adams*, 10 Met. 170, cited by defendant's counsel, is in no way decisive of this. By the statute of Massachusetts, the probate court makes the allowance in the first instance, subject to an appeal from his decision. In that case an appeal had been taken, which vacated the order of the probate court, and before the hearing in the appellate court, the widow died. There was, consequently, no amount allowed at her death, and the court held that they could not go on and make the allowance at the instance of her executor, and that no vested right existed until the amount was fixed. This may all be very correct, and still have no bearing upon a case where the personal representative of the widow is not proceeding to obtain an order fixing the amount, but to recover the amount fixed and allowed in her lifetime. We have not found it necessary to consider, whether the probate court might, upon a petition filed under section 48, take into consideration such circumstances, transpiring after the action of the appraisers, as tended to show that the amount ought to be increased or diminished; or whether the court should be confined to the consideration only of the correctness of the decision made by them, and we therefore express no opinion upon that subject.

The demurrer must be sustained.

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Where the state authorizes an agent to sell at public auction her public land, and to issue a certificate to the purchaser at such sale, and such agent is also authorized, after the time of sale by public auction, to sell at private sale any of the unsold lands, and the agent does sell at the public auction a lot of said land to A, who pays for the same and obtains a proper certificate, and the agent afterward sells the same lot at private sale to another person, the second sale is void.

In such case, if the governor make a deed to the last purchaser, and afterward, under a subsequent law, makes a deed to the first purchaser, the last deed will hold the land, although the last purchaser had no notice of the first purchaser's equity.

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IN CHANCERY. Reserved from Wood county.
The case is stated in the opinion of the court.

James Murray, for complainant, cited the acts referred to in the opinion of the court, and made the following points :

I. Where a public officer is required by law to do an act in the performance of his official duties, as between third persons, that act is presumed to be done, unless the contrary is shown. *Adams v. Jackson*, 2 Atk. 145 ; *The People v. The Auditor*, 2 Scam. 567 ; *Vaughner v. Biggers*, 4 Geo. 188 ; *Shelden v. Wright*, 7 Barb. 30.

II. The law required a correct list of the lands sold to be semi-annually returned to the office of the auditor of state, and filed therein. The bill avers this to have been done in this case. The law also required a correct list to be kept by the superintendent in his office. The legal presumption is, that this also was done.

III. The defendant, when he made his purchase, was bound to inquire whether the land had been sold at public sale ; if so, he of 298] course could not purchase by private entry. If he *had made proper examination in the office of the superintendent, and in that of the auditor of state, he would have ascertained that the father of the complainant had purchased and paid for this land. If he neglected to comply with this requirement, he can not complain if he suffer by his want of diligence.

IV. The special provisions of the statute are somewhat similar to those governing the sales in the Virginia military land district. Here each person is prohibited by the law from the entry of land that had been previously located. That he must examine the register of entries for the purpose of determining that question, appears from *Brush v. Ware*, 15 Pet. 111 ; *McArthur v. Thomas*, 2 Ohio, 418 ; *Nisewanger v. Wallace*, 16 Ohio, 559.

V. The government can only act by its agents. The agent can only act as to the subject and in the mode provided by law. In these sales, the agent of the state, when he had sold this land to the ancestor of the complainant, received the money, and given the purchaser a certificate of purchase, had exhausted his powers ; his duty was done, his authority at an end. Any attempt thereafter to sell the same land, or exercise any authority over it, was unauthorized by law, and void for want of power in the agent. The doctrine of *caveat emptor* applies, in its fullest extent, to a purchaser from him.

VI. If the title of the complainant is lost, it is not from his own fault or laches, or that of his ancestor. If the title is lost, it is from the default of the state, not in failing to give us title, for that we had, but in failing to execute the evidence of that title. The man who, in a purchase from another, loses his right to property, loses it either because the title never vested in him, or, having vested, it is lost by his own default.

M. R. Waite, for defendants, made the following points:

I. There is no such principle of law as that what is matter of record shall be constructive notice to the purchaser. *Dexter v. Harris*, 2 Mason, 536. It is the *statute* that gives to the [299 record of deeds, in the office of the recorder of a county, the effect of notice to subsequent purchasers, not the *record* itself.

II. No such statutory provision exists in relation to the reports of the superintendents, on file with the auditor of state. They are not even open to the examination of the public.

III. The bill does not aver that any plat or note of this sale was kept by the superintendent in his office. Nothing will be presumed to exist which is not averred in the pleadings, or at least which is not legitimately to be inferred from the averments.

IV. But suppose there was such a record. The principle applicable to the record and files in the auditor's office, is equally applicable here. The law does not declare such record shall be notice to subsequent purchasers. The list and the record are kept, not for the information of purchasers, but for the agents of the state. Even this is not open to the inspection of those wishing to purchase. The superintendent may *permit* it to be examined, but he is not *compelled* by law to do so.

V. The decisions as to the effect of the location of Virginia military land warrants, do not furnish a rule for the determination in this case. (1.) There the locator is required to record his entry or location. *Swan's Land Laws*, 121. That statute also gives authority to parties making application for entries, to demand of the surveyor a "view of the original or prior entry in his book, and also a certified copy of the same." This book of the surveyor is, therefore, a public record, and one which any one interested may inspect. (2.) There is another distinction. Here a valuable consideration is paid. There the grant is in the nature of a gratuity—it is a bounty. There the question arises between two donees;

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here between two purchasers. (3.) In the Virginia military lands, the entry is the act of the locator himself. He holds the warrant, and, by virtue of it, makes the location. Here the state sells; her agent puts the property into market, and offers it for sale. There 300] the locator makes his own selection, *and he must himself see that his lands have not been before entered. He acts at his peril. Here the state selects its lands for sale, and offers them to the public. The purchaser acts upon this offer. He must see that the original title of the state is good, but he need not inquire for her acts since acquiring title. The duties of the purchaser are, in this respect, not at all different from what they would be if he were dealing with an individual.

VI. Again, it is said the second sale was void for want of power in the superintendent to make it, he being only authorized to dispose, at private sale, of such lands as had not been disposed of at public sale. The superintendent was invested with full power to sell these lands. He was the proper person to apply to for the purchase. He sold, and upon his sale the governor conveyed. He has, in this case, assumed to sell this lot to Hollister. The purchase money has gone into the treasury of the state, and for that consideration the governor has executed the necessary grant, which passes the legal title.

The claim is, that as the act of the superintendent was unauthorized, it was *void*. If that is the case, it is wholly inoperative. It was no sale, and the deed executed by the governor was equally unauthorized and *void*. If *void*, it passed no title. It did not divest the state of the legal title, and the subsequent conveyance to Roseberry, made perfect his *equitable* into a *legal* title. Such, however, is not the operation of the conveyances. The courts have always held, that the legal title passes to the first grant, and that the elder purchaser, if he have the better equity, must obtain the legal title from the first patentee.

VII. It is said that Ebenezer Roseberry, at the time he obtained his certificate of purchase, acquired a title which he has not lost by any act of his own, and he ought not therefore to be deprived of his rights. It is averred in the bill, that at the time of his purchase, the superintendent executed to him the certificate required by the law. Section 7 of the act of 1824, provides, that upon the 301] presentation of such certificate to the governor, he shall *execute to the purchaser a deed. It was the duty, then, of Roseberry,

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to perfect his title by the deed, and have the same recorded in the county where the lands were situated. This would give notice to others of his claim. He has neglected this duty, and by reason of this neglect, another has been induced to purchase. His loss is, then, directly the consequence of his own laches. Had he been diligent, he could have saved his rights. Hollister did not purchase until nearly two years and a half after he did. The title never vested in Roseberry, and he has lost his right to the title by his own fault.

KENNON, J. The bill in this case states that on the 7th of June, 1825, Ebenezer Roseberry purchased, at the public sale of the Maumee and Western Reserve road lands, out-lot No. 220, in the town of Perrysburg; that he paid for the same the sum of \$29.75 in cash, at the date of the sale, and obtained from the superintendent a certificate of his purchase; that said sale was, in all respects, conducted according to the provisions of the act to provide for the construction of a road from the Maumee of Lake Erie to the Western Reserve, passed February 25, 1824, and the act amendatory thereto, passed February 7, 1825; that Quintus F. Atkins, the superintendent of the road, made due report of said sale, which was in due time deposited with the auditor of state, where it has remained; that Ebenezer Roseberry died in 1826, without having received a deed for the lot from the State of Ohio; that on the 29th of January, 1833, the legislature of the state passed an act directing the governor to execute to the heirs of Roseberry a deed for said lot; that in pursuance of such direction the governor, on the 26th of February, 1833, did execute such deed; that complainant has acquired the title from the other heirs; that on the 10th of January, 1828, John Hollister purchased the same lot from the state, and obtained a deed from the governor for the same, which he now holds. The bill prays that the defendants may be compelled to convey the legal title to the lot, which, it is [302 claimed, they hold in trust only for complainant.

To this bill John Hollister pleads that, on the 2d of November, 1827, he purchased from the State of Ohio said lot, for \$47.50, by applying that amount in part payment of the amount due to him from the state upon a contract, made on the 22d of June, 1825, with the superintendent of the road, for the construction of a part of said road; that in pursuance of said purchase the lot was, on

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the 10th of January, 1828, conveyed to him by the governor; and that, when Hollister made the purchase, paid the purchase money, and received the conveyance, he had no notice of the purchase by said Roseberry, nor of any claim in favor of said Roseberry or his representatives.

The cause came on for hearing on the bill and plea, and the only question therefore presented for the consideration of this court, is the sufficiency of this plea.

The cause is to be considered as if it had been set down for hearing on the plea, and the plea viewed as though it had been demurred to for insufficiency in an action at law.

This plea is therefore to be taken as true, and that the defendant was a *bona fide* purchaser, without notice in fact of the complainant's claim; and the first question therefore to be considered is, whether he had constructive notice, or such notice as the law will conclusively impute to him.

A man may be a *bona fide* purchaser from A, without any notice in fact that B had purchased the same land from A, and had his deed regularly placed upon record; still, as between B and the subsequent *bona fide* purchaser, without notice in fact of the previous purchase, the law would not permit the second purchaser to prevail because he had no notice. He would be presumed to have had notice, and such presumption would be conclusive.

Can any such presumption of law be raised in this case, notwithstanding the plea of a *bona fide* purchaser without notice?

303] *It is alleged that the land belongs to the state, by grant of Congress, for the purpose of constructing a road from the Maumee of Lake Erie to the line of the Connecticut Western Reserve; that it was made the duty (by an act of the legislature of Ohio) of the superintendent to sell these lands at public sale, and semi-annually to make return to the auditor of state a correct statement of the land sold, to whom, and at what price; that the superintendent did, in compliance with such duty, make such return immediately after the sale to complainant, and the same still remains to be seen on file in the auditor's office; and this is claimed, in law, as a conclusive presumption of notice to the defendant, who subsequently purchased. It is also alleged, by way of argument, but not so stated in the bill, that by the first section of an act amendatory to the act of 1824, passed in 1825, it was made the duty of the superintendent to keep a correct plat of all the lands, etc., with a note of those sold, etc., in

his office; and it is insisted that, as the presumption of law always is that an officer has done his duty, that it is to be presumed that such plat and note of sales were left in the office of the superintendent, and therefore that this plat and note were also notice to the defendant of complainant's equity.

As to this last claim of notice, it is enough to say, that although the law would presume that the officer did his duty in this respect, and did keep such plat and note, yet he may not have done so; and in such case the defendant might well say he had no notice; and the question of notice or no notice in such case would be a question of fact, which could only be tried on an issue taken on the plea, and not on demurrer to the plea, which admits he had no notice, unless the law would conclusively presume such notice.

But it is expressly averred in the bill, and not denied by the plea, that the superintendent did make return to the auditor of state of the sale of this lot, to whom sold, and for how much. That return was on file in the auditor's office at the time of the purchase by the defendant, and if he had seen such return, he *would not be [304 a *bona fide* purchaser without notice. The plea shows that he did not see the return or know of the same.

The question is therefore properly raised, whether the law makes this return of the superintendent notice, and conclusive notice, to all subsequent purchasers.

By section 8 of our registry act (Swan's old Stat. 267), all deeds are required to be recorded within six months from the date thereof; and if such deeds shall not be recorded within that time, the same shall be deemed fraudulent as against subsequent purchasers, having no knowledge of the existence of such former deed: provided that such deed (or other instrument of writing for the incumbrance of land) may be recorded after the expiration of the six months from the date of such deed, and from the date of such record shall be notice to any subsequent purchaser.

Under this section of the statute, all deeds recorded within six months from date are conclusive notice to subsequent purchasers; and so, also, if not recorded within that time, are conclusive notice, from the date of the record, to all subsequent purchasers. In this case, the first deed made by the governor was to the defendants, so that, if the legal title passed at all by that deed, it was vested in the defendant long before any deed had been made to complainants; and the question arises, whether, by the act requiring the superin-

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tendent to make a return of his sales to the auditor of state, the defendant had notice of the complainant's prior equity. If it became necessary for the court to decide this question, we would be inclined to the opinion that this provision of the act was not intended to give notice to subsequent purchasers, but simply to enable the state to know how much money the superintendent had received, and from whom, and how much was still due the state, and to operate as a check on the superintendent himself, and not as a notice to subsequent purchasers. Upon this point, however, we give no opinion, but pass to the only other point in the case, namely, whether 305] any title passed by the deed *under the second sale to the defendant. By the second section of the act above referred to, the superintendent, appointed as by that act provided, is authorized to sell, after giving public notice in some newspaper, at public sale, the lands donated by Congress to the state; such sale to be held at Lower Sandusky, and to be continued from day to day, from the second Monday of May, 1824, until the second Monday of June next following, or until any quantity of land not exceeding thirty thousand acres should have been sold: provided that no part of said land should be sold for less than one dollar and fifty cents per acre. By the 5th section it is provided, that after the second Monday of June, if the whole of said road shall not be contracted for, or if thirty thousand acres of said land shall not have been sold, the superintendent shall have power to enter into private contracts for such parts of said road as shall have remained uncontracted for, and may also sell, at private sale, as much of said land as, together with what shall have been theretofore sold, shall amount to thirty thousand acres.

After the first public sales had been made, and after the time had arrived at which the superintendent was authorized to make private sales of these lands, the legislature, on the 7th of February, 1825, passed an act to amend the first-named act, by which the superintendent was required to cause the lands belonging to the State of Ohio, in the reservation at the foot of the rapids of the Sandusky river, adjoining to the road on each side thereof, to be surveyed into small lots, streets and alleys, of such number, size, form and width as he might deem most beneficial to the interests of the state; and also to cause to be made such surveys, as he might think necessary, of the lands belonging to the State of Ohio, in the reservation at the foot of the rapids of the Maumee of Lake Erie,

and to cause a plat to be made of all the lands so surveyed belonging to the state; one copy of which he was to transmit to the secretary of state, and retain another in his office, in which he was to note all sales by him made.

*By section 3 of this amendatory act, the superintendent was to sell at public auction to the highest bidder, on the first Monday of June, 1825, and for five days thereafter, at Lower Sandusky, all lands belonging to the State of Ohio, in the reservation at the rapids of the Sandusky and Maumee rivers, agreeably to the plat and surveys directed to be made by this act, and the act to which this is an amendment; but no part of the land in these reservations was to be sold for less than seven dollars per acre. [306]

Under this last act, and within the six days prescribed by the same, the ancestor of the complainant purchased and paid for this lot to the state. After the expiration of these six days, in which these lands were authorized to be sold at public sale, the superintendent might, possibly, sell any of the unsold lots at private sale, under the act of 1824. However that may be, it is very clear that the state never intended to authorize the superintendent to sell, either at public or private sale, any of those lands which he had before sold and for which the state had received the full payment, and for which the superintendent had given to the purchaser a certificate announcing such payment.

The sale in this case was made to the defendant (probably at private sale) after the state had parted with all her equitable interest in the lot, and was made by the superintendent professing to act as agent of the state, authorized as such by a law of the state. The defendant contracted with this agent of the state, knowing that the agent was not authorized to make a sale of any lot which had previously been sold to any other person. The defendant did not, as averred by his plea, know that this lot had been sold to the ancestor of complainant; but he did know that, if such sale had been made, the power of the agent of the state had thereby been exhausted. The authority of the state's agent depended on the fact of whether he had made a previous sale of this lot. If he had not, then he could sell to the defendant; if he had, then he was not authorized to sell. The superintendent *having, according [307] to the authority conferred on him by the state, offered at public auction, and sold, this very lot, he had no authority from the state

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to afterward sell the same lot, at private or public sale, to any body; and, therefore, the second sale was wholly unauthorized by law, without any authority as the agent from the principal to make the sale.

The law of *caveat emptor*, in such cases, applies with all its force to the purchaser. He buys at his peril. If the land had not been previously sold, he acquires title; if it had, he gets no title.

The state, in this case, so far from doing any act which would ratify the act of the agent, repudiates his authority, and authorizes the governor to convey to the heirs of the first purchaser.

The state can act only by its agents, duly authorized by law; and where such agents, being (as in this case) mere ministerial officers, transcend their authority, their acts are void, or at least voidable by the state.

In the case of *Stoddard et al. v. Chambers*, 2 How. U. S. 284, where two patents had been issued by the United States for the same land, and the first in date be against law, it was held that it does not carry the legal title: that the issuing of a patent is a mere ministerial act, and if it be issued for land reserved from sale by law, it is void.

If this lot in controversy had been reserved from sale, and a sale made by the superintendent, and a patent had been issued by the governor of Ohio for the same, the patent would have been void; and we see no good reason why, in this case, the patent issued for land not reserved from sale by the state, but actually sold by the state, should not likewise be void.

The plea in this case is overruled.

308] *JOHN U. GIESY v. THE CINCINNATI, WILMINGTON AND ZANESVILLE RAILROAD COMPANY.

The act of April 30, 1852, conferring upon the probate court jurisdiction in cases for the appropriation of private property to the use of corporations authorized to construct public improvements, is a constitutional enactment. Proceedings under that act may be instituted, jointly, against all the owners of property lying in the county and sought to be appropriated; but after the

return of the jury from the view, *each* owner of distinct property is entitled to a separate trial.

The general assembly possesses the constitutional power to confer upon a corporation authorized to construct a railroad, the right to appropriate grounds necessary for its use for a *depot*.

The act of February 11, 1848, confers such right; and the act of 1852 is sufficiently comprehensive to give it effect, whether the proceeding is controlled by article 1, section 19, or article 13, section 5, of the constitution.

The power of *eminent domain* is not conferred by either of these sections; they simply prescribe modes for, and limitations upon, its exercise.

The power is an inseparable incident of sovereignty, and its exercise, for the accomplishment of lawful objects, is conferred upon the general assembly in the general grant of legislative authority.

It may be used to appropriate lands for a public highway of any kind; and this whether the road is built and owned by the public, or by a corporation as a public instrumentality: provided it is kept open for public use, as a matter of right; or, according to the nature of the work, the corporation is made a common carrier of goods or passengers.

It may be exercised directly or indirectly by the general assembly, without the intervention of the judiciary, except for determining the amount of compensation. But the courts possess full power to determine its proper limits, and to prevent abuses in its exercise.

The power rests upon the public necessity, and can only be exercised where such necessity exists.

But this necessity relates rather to the nature of the property, and the uses to which it is applied, than to the exigencies of the particular case; and it is no objection to the exercise of the power, that lands, equally feasible, could be obtained by purchase.

•Only such interest as will answer the public wants can be taken; and [309 it can be held only so long as it is used by the public, and can not be diverted to any other purpose.

The provisions of article 1, section 19, and article 13, section 5, of the constitution—the one requiring compensation to be made without *deduction* for benefits, when property is appropriated to a public use, and the other providing for compensation *irrespective* of benefits, where it is taken by a corporation for a right of way—are, in legal effect, identical.

When taken under either section, its fair market value in cash, at the time it is taken, must be paid to the owner; and the jury, in assessing the amount, have no right to consider or make any use of the fact that it has been increased in value by the proposal or construction of the improvement.

PETITION in error, reserved in Fairfield county.

The petition was filed in the district court to reverse a judgment of the court of common pleas, in a proceeding in certiorari. The certiorari was resorted to to reverse certain proceedings of the probate court, on an application by the Cincinnati, Wilmington, and

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Zanesville Railroad Co., for the appropriation of lands owned by John U. Giesy and Jacob Bowmaster. The court of common pleas affirmed the judgment of the probate court.

In the probate court, the application states that the corporation "desires to appropriate" the lots in question "to its use, and to use and occupy the same as parcel of its depot grounds in Lancaster," and concludes: "Said corporation therefore requires the proceedings necessary to condemn said property for that purpose to be had before you." The language of the application as to Bowmaster was like that as to Giesy.

A plea to the jurisdiction was interposed, on the ground that the "said probate court has no proper or constitutional jurisdiction in or over the subject-matter in controversy." To this plea, replication was filed. The plea was overruled.

Giesy then moved the court to dismiss the application, alleging that the C., W. and Z. R. R. Co. "have no power or legal constitutional *authority to condemn and appropriate, without the consent of the said Giesy, said real estate as described and set forth in said specifications, to the uses and purposes of said company, as prayed for in said specification." This motion was overruled.

Before the impaneling of the jury, the defendant, Giesy, "objected to proceeding in this case any further, for the reason that the judge of said probate court is the regularly appointed, qualified, acting treasurer of said C., W. and Z. R. R. Co., at a fixed salary of \$600 per annum;" and the objection being overruled, exception was taken.

A jury was then impaneled and sworn justly and impartially, according to the best judgment of the jurors, to assess the damages in money which Bowmaster and Giesy would each sustain by reason of the appropriation of such property to the use of the company in the proceedings now pending—the oath concluding: "And you do further swear that you will fully, faithfully, and impartially estimate and assess the amount of such compensation, irrespective of any benefit to them of any improvement proposed by said corporation." The sheriff was then commanded to conduct the jurors to view the property, in presence of Mr. Brazee on the part of the corporation, and Mr. Van Trump and Newton Schleich, on the part of the owners, appointed by the court. The view was had accordingly, and, after hearing evidence and arguments, the jury rendered separate verdicts. It appears that Giesy objected to the proposition of the

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counsel of the company to try the cases of Bowmaster and Giesy jointly, but that the objection was overruled, and the overruling excepted to. It also appears that Giesy moved to substitute for the oath actually administered, an oath "to assess the amount of compensation for said real estate described and set forth in said specification, at its present cash value, without deduction for any general enhancement of value to said real estate, arising from the construction of the said railroad of the said C., W. and Z. R. *R. Co.," [311 and objected to the oath as administered. The motion and objection being overruled, exception was taken. A witness being asked, "what is the present cash value of the twelve lots of Mr. Giesy, excluding any increase or contemplated increase of value arising from the construction of the C., W. and Z. R. R.?" Giesy objected to the question; his objection was overruled; the question and answer was permitted to go to the jury, and Giesy excepted. Another bill of exception is in substance as follows: Giesy propounded the following question to a witness: "(the question in issue to the jury being the amount of compensation to be allowed to the said Giesy for the real estate described in said specifications, to wit, taking into view all the elements which have gone to enhance the value of real estate in and about Lancaster, including the general advancement of value to said lots arising from the location and construction of plaintiff's railroad) what is the present cash value of said twelve lots?" The counsel for the company objected to this question, and the objection being sustained, the defendant excepted. "Whereupon," proceeds the record, "the court limited the examination of the witnesses on the behalf of the said defendant, Giesy, to the question of the present cash value of said lots, excluding therefrom all enhancement of value to said lots arising from the construction of said C., W. and Z. R. R.; to which ruling of the court the said defendant, Giesy, by his counsel, excepted." The verdict of the jury being rendered, Giesy moved for a new trial, and the motion being overruled, he took exception.

In the district court the assignment of errors was as follows:

1. The said court of common pleas erred in not reversing the judgment of said probate court, upon the ground of the overruling by said probate court, the plea of your petitioner, to the jurisdiction of said probate court.

2. The said court of common pleas erred in not reversing the judgment of said probate court, upon the ground of the overruling

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by the said probate court, of the motion to dismiss said cause, 312] *for the reason as set forth in the motion of your petitioner, which said motion is contained in the record of the proceedings herewith filed as aforesaid.

3. The said court of common pleas erred in not reversing the judgment of said probate court, upon the ground that the said probate judge was disqualified to sit in said cause, because of his being the regularly appointed, qualified, and acting treasurer of said Cincinnati, Wilmington and Zanesville Railroad Company, at a fixed salary of six hundred dollars per annum.

4. The said court of common pleas erred in not reversing the judgment of the said probate court, upon the ground that the jury, before said probate court, were impaneled and sworn, and testimony submitted to said jury, in the manner and form as set forth in said record, herewith filed as aforesaid.

5. The said court of common pleas erred in not reversing the judgment of said probate court, upon the ground of error of the said probate court in administering the oath to said jury, in the manner and form as set forth in said record, herewith filed as aforesaid.

6. The said court of common pleas erred in not reversing the judgment of the said probate court, upon the ground of said probate court overruling the objection made by your petitioner, before said probate court, to certain testimony offered by the said Cincinnati, Wilmington and Zanesville Railroad Company, and permitting said testimony to go to the jury, as shown by said record, herewith filed as aforesaid.

7. That said court of common pleas erred in not reversing the judgment of said probate court, upon the ground that said probate court ruled out certain testimony offered by your petitioner at the trial of said cause in said probate court, as shown by said record, herewith filed as aforesaid.

8. Other manifest errors.

313] **P. Van Trump*, for plaintiff in error, made the following points:

I. The framers of the constitution, by conferring upon probate courts "such other jurisdiction, in any county or counties, as may be provided by law" (Const. Art. 4, sec. 8), had in view special

legislation. The statute of April 30, 1852, being in the nature of a general law, is unconstitutional.

II. The probate judge, before whom this case was tried, being, as the record shows, the treasurer of the defendant in error, at a fixed annual salary, was disqualified at common law as well as under the statute. See section 3 of statute of March 14, 1854, Swan's Rev. Stat. 232.

III. The defendant in error had no legal power or constitutional authority to condemn and appropriate, without and against the consent of the plaintiff, his real estate to the uses and purposes of the company. Section 5, of article 13, of the constitution, only confers the power upon corporations to appropriate a right of way—an easement—not, as sought in this proceeding, the entire property of the *locus in quo*. The power of a railroad company to appropriate land for depot grounds will not be construed to exist by implication, unless such a case is made out in terms, that the acquisition of the particular property sought to be appropriated is essential to the existence of the corporation. The act of April 30, 1852, under which these proceedings were commenced, does not confer, in terms, the power to condemn property for the purpose of depot grounds, nor do either of the supplementary acts confer that power; if they did, they would be unconstitutional and void.

The provisions of section 19 of the bill of rights, and section 5 of the article on corporations in the constitution, upon which the company in this case have planted themselves, can not be made to stand together, if depot grounds are held to be included in the term "right of way."

IV. Each owner of distinct property within the county sought to be appropriated, is entitled to a separate trial under the [314 statute. All that was in the legislative mind, when the form of the oath to the jury was framed, as contained in section 5 of the statute of April 30, 1852 (Swan's Rev. Stat. 233), was an intention to meet and cover a case, where several persons were jointly interested in the property sought to be condemned.

V. The amount of compensation for the real estate sought to be appropriated, must be assessed at its true cash value, without deduction for any general enhancement of value to such real estate arising from the construction of the railroad.

The assessors appointed to assess damages to individuals through whose lands the public canals of the state passed, in the discharge

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of their assessorial duties, under the act of 1825, deducted from the damages sustained the general enhancement of value, either to the specific property itself or to any other property of the owner, produced by the public improvements proposed by the state. It was this rule of practice and the law as claimed in the case of *Symonds v. City of Cincinnati*, 14 Ohio, 147, which the framers of the new constitution intended to overthrow by adding the significant clause, "Without deduction for benefits to any property of the owner," to section 19 of the bill of rights. See 2 Debates Ohio Conv. 178. See also *Cooper v. Williams*, 4 Ohio, 287; *Meacham v. Fitchburg Railroad Co.*, 4 Cushing, 291; 1 Am. Railway Cases, 584. There is no more propriety or legal force in the proposition, that the government may project a public improvement, seize a portion of the property of one of its citizens, and then compensate him for the value of the property thus taken, by charging him with the benefits thereby conferred upon his other property, than in one citizen charging another for benefits which he has voluntarily conferred.

Brazee & Son, for defendant in error, made the following points :

I. The probate court has been properly vested with jurisdiction 315] *in cases of this description. The probate court was unknown to our old constitution. By a wise and useful provision, the framers of the new constitution imparted to it the jurisdiction specifically enumerated, and to the general assembly they imparted the power to make it subservient to the changing wants and necessities of the people. While section 8, of article 4, of the new constitution, admits of the limited jurisdiction claimed by opposing counsel, it also admits of such other general jurisdiction as the wisdom of the legislature may impart to it. In the act of April 30, 1852, we have a clear and explicit legislative construction of this clause of the constitution.

II. The act of March 14, 1854 (Swan's Rev. Stat. 232), makes the interest of the judge, in the company whose rights are the subject of his judicial action, the means of disqualifying him to act. A treasurer of a corporation has, as such, no legal interest in the company. The reason operating on the legislative mind, which induced the disqualification of directors of companies may be supposed to have been the known fact, that directors are uniformly chosen from the body of stockholders.

III. It is proper to consider section 19 of the bill of rights, and
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section 5, article 13, of the constitution, together, both being provisions on the same subject-matter. The former declares the inviolability of all private property and its subserviency to the public welfare; it also prescribes the rule of compensation and the mode by which it shall be ascertained. The latter is not a grant of power to corporations, nor to the general assembly, but a rule for legislative action. Without it, the legislative power over the subject-matter, of appropriating private property to public uses, would stand unimpaired. That power arises as well from the general principles that lie at the foundation of the government, as from its express recognition in the bill of rights.

The terms "right of way" embrace all lands required for the uses of the company, as incidental to the right of way; such as lands for stations, side-tracks, depots, turn-tables, machine-shops, *and other kindred purposes. A railroad without these facilities would be worthless to its owners, as property, and of no value to the public. [316

The legislature have provided a mode for the condemnation of property outside of the railroad track. Section 1 of the act of April 30, 1852 (Swan's Rev. Stat. 232). Section 4 of the act of May 1, 1852 (Swan's Rev. Stat. 200), confers upon railroad companies, not only the power of laying the track, but also the authority to construct and maintain such depots, as the corporation may deem necessary.

IV. Two persons holding separate property sought to be condemned, may be united as defendants in the same proceeding, under the statute. The provisions of the statute warrant such joinder. Swan's Rev. Stat. 232, secs. 2, 3, 5. The mode of proceeding, therein authorized, leads to expedition in transacting the business, and to great saving of costs, without any disadvantages arising to any one.

V. The true rule of damages, as fixed by our existing constitution and laws, is, that no part of the value of the property taken shall be paid by benefits conferred, by the making of the railroad on other property of the plaintiff in error. This construction is consistent with the language used, and suppresses the evil complained of under the old constitution. The increased value arises out of the act of the company in making their road, and not in any degree from the expenditure or labor of the owner. The

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claim of the plaintiff in error is not sustained or countenanced by any rule of justice or equity.

H. H. Hunter, for plaintiff in error, in reply.

The provision in section 19, of the bill of rights, is a dead letter, in so far as it authorizes the seizure of private property for any public use, which entitles the owner to be paid, or secured in its payment, before the seizure, until the legislature shall, by law, prescribe the cases in which the seizure may be made, and provide in [317] *what way the amount of the compensation to the owner shall be ascertained. This has not been done, so as to embrace the case now before the court. There is a defect of legislation, as applicable to this case, in two material particulars, viz :

1. In the grant of the power to the defendant, to appropriate the property in question of the plaintiff to the use proposed, against the will of the plaintiff.

2. Because there is no provision made by law, enacted pursuant to the provisions of section 19, of the bill of rights, prescribing in what way the amount of compensation to be made to the plaintiff shall be ascertained.

The draftsmen of the act of April 30, 1852, had in view section 5, of article 13, of the new constitution, which is specifically limited to appropriations of the right of way to the use of corporations.

The two clauses of the constitution in question are widely different, and by no means identical in meaning. The consequence of this is, that the operation of the act of April 30, 1852, can not be extended to any case, except the one case of appropriations for right of way, under section 5, article 13, of the constitution. If this be so, the further consequence is, that no provision of law has been made for other cases, including the case in hand, unless the term "right of way," in the constitution, includes easements for all purposes needful for the use of a railroad. But there is no legal necessity thus to strain the meaning of these terms, for section 19, of the bill of rights, very clearly covers all possible cases, and would cover this of the "right of way" also, if it were not specially provided for by section 5, of article 13.

But even if the true interpretation of both clauses of the constitution should be the same, and that be, in effect, that no deduction shall be made on account of anticipated benefits arising from the location of the road, the rulings of the court are not warranted. If

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one of the incidental causes of enhanced value happens to be an established, actually located railroad, the corporate body owning the road has no right, legal or equitable, in any form, to *assert [318 any claim to or in the property, by reason of the reflected value given to it by its road. And if it desires to appropriate the property to its own use, as in this case, for depot purposes, it has no right, consistently with sound principles, to have it at a reduced value, on the ground that a part of its real value arises as an incident from the location of a road.

Section 5, of article 13, of the constitution, relates, in express terms, to a "right of way," a thing in contemplation—a "proposed" thing; and provides, in reference to it, that in estimating the value of property to be condemned to be used for the right of way, it shall be done irrespective of benefits from any improvements proposed by the corporation. The enhancement of value of the property of others, by "proposed" improvements of this kind, can no longer be a commodity which such corporation can compel people to take for their property.

But, under section 19, of the bill of rights, the owner of property is entitled to it with all the value it has, arising from whatever cause actually existing; such as an actual fixed location of a road in the near vicinity of the property, whereby, as an actual existing fact, the property sought to be condemned had come to be enhanced in value.

RANNEY, J. The case presents a number of very interesting and important questions, relating to the appropriation of private property to the uses of railroad corporations. The proceeding was prosecuted under the provisions of the act of April 30, 1852 (Swan's Rev. Stat. 232), in the probate court of Fairfield county. From such of the assignments of error as have been pressed upon our attention in argument, the following propositions are presented:

1. It is claimed, that the probate judge, being then treasurer of the company, but not interested in its stock, was incompetent to sit upon the trial of the case.

2. That the probate court had no jurisdiction.

- *3. That the court erred in compelling the plaintiff in error [319 to go to trial jointly with another person, with whom he had no common interest, but whose separate property was sought to be appropriated.

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4. That the company had no legal or constitutional authority to appropriate lands for *depot* grounds.

5. That the court erred in holding that the increase of value to the property, arising from the construction of the road, should be *excluded* from the amount assessed to the owner.

1. We do not find it necessary to express any opinion upon the first question presented. If the position was well taken, it was the duty of the probate court to have certified the cause to the court of common pleas. For reasons hereafter stated we must reverse this judgment; and the case will then go to the common pleas for final judgment, in pursuance of the provisions of section 10 of the act referred to. In no event can the probate judge be again called upon to act.

2. The second position relied upon is grounded upon the assumed unconstitutionality of the act under which the proceedings were had; and involves a denial of the capacity of the probate court to receive jurisdiction in such cases by a *general* law. Section 8, of article 4, of the constitution, provides: "The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of accounts of executors, administrators, and guardians, and such jurisdiction in *habeas corpus*, the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians, and such other jurisdiction in *any county, or counties*, as may be provided by law."

This jurisdiction, it is evident, must depend upon a proper construction of the last clause of the section, which was added to the original draft by way of amendment, and is not very happily expressed. It is not doubted that the general assembly might confer this 320] jurisdiction in one or more counties; but it is *said it must be conferred by a special or local law, and can not be extended to all the counties of the state by a general enactment. The legislature has uniformly construed it differently. Not only the act now drawn in question, but the act investing that court with jurisdiction in minor offenses, are general laws extending to all the counties. This repeated expression of opinion on the part of the legislative body is not only entitled to great respect, but is absolutely binding upon us, until it is made unquestionably to appear that they have mistaken their powers, and a clear incompatibility between the constitution and the law is established. 1 Ohio, 77. We are very far from be-

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ing convinced that any such repugnancy exists. The words "in any county or counties," were probably used rather as enabling than restrictive language, and were designed to permit the general assembly—notwithstanding the provision of section 26 of article 2, requiring "all laws of a general nature to have a uniform operation throughout the state"—in its discretion, to confer upon the probate court more extended powers in some counties than in others. Upon the opposite construction, a power to confer the jurisdiction in one county by a local enactment is a power to confer it in all the counties in the same manner; which brings us to the absurd conclusion that the legislature is competent to do by ninety laws what it is incompetent to do by one.

3. It appears from the record that the company commenced proceedings at the same time, and by two separate statements, against the plaintiff in error, for the condemnation of twelve lots in his addition to the town of Lancaster, and against one Jacob Bowmaster for the appropriation of one lot belonging to him. The second bill of exceptions shows it to have been admitted that the two cases were entirely separate, and that the parties held their property by distinct titles. Under these circumstances the court, at the instance of counsel for the company, and against the objection of the plaintiff, ordered the jury to be impaneled *and the evidence to [321 be given in both cases, at the same time, and jointly. In this, we think, the court most clearly erred. To a certain extent, the subject is not without difficulty; but there is none whatever, in saying the joint trial was wholly unauthorized. The second section of the law very properly allows the corporation to embrace in its statement, a description of all the property, lying in the county, which it desires to appropriate; and requires it to name the owner of each parcel, and the uses to which it intends to subject the property. A jury is then to be selected, in the same manner and from the same persons, as the regular juries of the county, for which a venire issues, returnable on a specified day, and at the same time a notice to each owner, "of the time when such jury will meet at the office of said judge." So far, all is plain. But how shall the jury be impaneled? In each case separately, or for all the cases embraced in the statement jointly? Upon this subject, the statute, like too much of our legislation, is full of doubt and obscurity. It expressly gives the right of challenge for cause to either party. The right of each owner to retain upon the panel

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such members of the regular jury, as neither the company nor himself could except to, would seem to be almost equally important; but it is seriously impaired, if he is bound to submit to challenges made by other owners. I am, however, inclined to think that the law subjects him to this inconvenience, and contemplates but a single jury, to be composed of those against whom no just exception can be alleged, by any of the parties interested. But as no challenges were made in this case, it does not call for a definitive opinion. Admitting the court to have proceeded irregularly, it does not appear that the plaintiff was injured. But there is a limit to this proceeding in common.

If the law, for the benefit of the corporation, compels each individual owner to submit to such inconveniences, as may be necessary to enable them to appropriate all the lands they may desire in the 322] county, in a single proceeding, and with the view *of a single jury, it does not compel him to proceed jointly after the jury have returned from the view, nor to encounter the jargon, confusion, and uncertainty of a joint litigation. He has, then, the right to demand that his rights and interests shall engage the separate attention and examination of the jury, upon such evidence as he may be able to produce—the 6th section expressly providing, “that witnesses may be examined before said jury, after their return to the court aforesaid, and the trial in each case shall be conducted thereafter in said probate court, in the same manner that the trial of civil cases is conducted in the court of common pleas of the county in which said proceeding is had.”

In denying the plaintiff in error this right, the court most manifestly erred.

4. The lots sought to be appropriated, are described in the statement filed by the company, as a necessary part of its *depot* grounds in Lancaster. The plaintiff's counsel deny that it has any power to condemn property for that purpose. One of them seems to insist that the general assembly could have conferred no such power, “unless it was shown in the case made by the company, that the *very existence* of the corporation depended upon a resort to this extreme medicine of the constitution:” and both concur in claiming that the act under which the proceedings were prosecuted, extends no further than to carry into effect section 5, of article 13, of the constitution, which provides only for an appropriation of the *right of way*; and that, it is not only alto-

gether insufficient, but inconsistent, with the exercise of any authority under section 19 of the bill of rights. The argument amounts to this: By the latter section the property is to be paid for "without *deduction* for benefits to *any* property of the owner;" which necessarily covers its true value in money, from whatever causes derived; but it may be assessed by any number of persons, a jury, and without the intervention of a court of justice. By the first, it is to be assessed by a *jury of twelve men, in a court [323 of record; and is to be valued "*irrespective* of any benefit from any improvement proposed by such corporation." In the one case, allowing the owner the benefit of any increase arising from the construction of the work; and in the other, depriving him of it. And inasmuch as the act referred to, requires the jury to be sworn to assess the amount *irrespective* of these benefits, it can not be extended beyond the purposes for which that mode of assessment is provided.

We do not concur in either position. This company was incorporated on the 4th of February, 1851 (49 Ohio L. L. 424), and was invested with all the rights, and made subject to all the restrictions, of the general railroad act of February 11, 1848 (2 Curw. Rev. Stat. 1396). By section 9 of that act, the company is expressly authorized to appropriate such property as may be deemed necessary for its railroad, including "necessary side-tracks, *depots*, workshops, and water-stations;" while the first section of the act of 1852, provided that all appropriations thereafter made, either "for the right of way, or for any other purpose which might be within the legal authority of such corporation," should be made and conducted under that act.

So far as the argument is based upon any supposed difference between these two sections of the constitution, as to the mode of assessment, or the amount to be paid, we think it, for reasons hereafter stated, wholly unfounded. It is, therefore, entirely immaterial which section is looked to for the governing principle. If either warrants the proceeding, there is no want of legislation to give it effect.

The question comes to this: Had the general assembly power to confer upon the corporation the right to condemn property for depot purposes? The first thing to be borne in mind is, that neither of the sections referred to attempts to confer the power of eminent domain. They simply prescribe modes for, and limitations upon, its exercise. The power itself is an inseparable incident of sov-

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324] ereignty, and its exercise was delegated by the *sovereign power to the general assembly, in the general grant of legislative authority. It may be defined to be the right of the sovereign, without the consent of the owner, when necessary, to make private property "subservient to the public welfare."

It rests upon the public necessity—subordinates the rights of one to the welfare of all—and is just as broad as that necessity, and no broader. If the wants of the public are attained by the acquisition of an *easement*, nothing more can be taken; if the whole interest is required, the whole may be appropriated. Whether this power is derived from an implied condition in every grant, by which property is held under the government; and whether, where no constitutional restraints exist, it may be exercised without making compensation, are rather questions for ingenious speculation than of practical importance. It is enough that its existence is everywhere acknowledged, and that its exercise for many important purposes, both in peace and war, in the direct form of appropriation and the indirect method of taxation, is absolutely necessary to enable any government to attain the great ends for which it is instituted; while no enlightened government, at this day, attempts to appropriate without compensation, and, in this country, it is everywhere enforced by constitutional provisions.

In this state, the power is lodged with the general assembly, to be used when necessary to the attainment of its lawful purposes, and, in my judgment, can neither be surrendered, impaired, nor abridged by that body.

One of these purposes, inferior to none in its influence upon the comfort, convenience, and prosperity of the people, and the security of the state, is the obligation to provide for the construction of public highways. I use the term in its largest sense, without any restriction as to the character of the structure, or the mode of travel and transportation upon it. Such works can not be constructed without subjecting, to the use of the public, the lands of private
325] individuals, situated in the particular localities necessary *to be occupied by these improvements. They must be had, either with or without the consent of the owner. As he has the power to withhold his assent, and as the necessary functions of government ought not to be paralyzed by the will of a single individual, nor the interests of all be made subservient to the whim or caprice of one, it

has always presented one of the most clear and unquestionable instances for the exercise of the power of eminent domain.

In the accomplishment of these purposes, when not expressly restricted by the constitution, the whole field of means and instrumentalities is left open to the choice of the general assembly. Such works may be constructed, in whole or in part, by the public, by means of taxation; or through the instrumentality and with the means of private individuals incorporated for the purpose; and, under suitable regulations—according to the nature of the work—obligated to keep them open for general use, or made common carriers of passengers or goods. In either mode the great end is attained—a public highway, open to the use and necessary to the convenience, or business and social intercourse, of the public at large. If the latter is adopted, the private owner yields the use of his property only to the public, and just so much, and no more, as will answer their purposes—the corporation being a mere trustee of the interest for their use, with no power to divert it to any other purpose, or to hold it one moment longer than it is made to serve the uses for which it was appropriated. *The Cincinnati, Wilmington and Zanesville Railroad Company v. Clinton County*, 1 Ohio St. 77; *Chagrin Falls and Cleveland Plank-road Company v. Cane*, 2 Ib. 419.

The power of eminent domain is rather a political than judicial power, and by our constitution, its exercise is intrusted to the general assembly, so far as determining the necessity and propriety of the appropriation is concerned; while the courts are only invested with authority to determine the amount of compensation to be paid. The power may be exercised directly by that body, or [326 through subordinate agencies; and while it would seem to me much more consistent with a proper regard for private rights, that the question of necessity as well as compensation should here, as in England, be determined by some impartial public tribunal, I am not prepared to say that any well-founded constitutional objection exists to committing its exercise to the corporation authorized to construct the work, as has been generally done in this state. In saying that the exercise of this power properly belongs to the general assembly, and not to the judiciary, I do not intend to express a doubt, that in cases where its limits have been exceeded, or its spirit and purpose abused, a judicial remedy may not be afforded. If the legislature, by a direct exercise of authority, should under-

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take to appropriate property for purposes beyond the scope of this power; or if any subordinate agency, under a power properly conferred, should abuse the authority by using it irregularly, oppressively, or in bad faith, there can be no doubt of the power of the courts to furnish an effectual remedy against such illegal acts.

I have said that a public necessity must exist to warrant the exercise of this power; but I am very far from agreeing that it must be that controlling necessity upon which the very existence of the corporation depends, spoken of by counsel. I think this doctrine, and that advanced by the chancellor in *Beekman v. The Saratoga and Schenectady Railroad*, 3 Paige, 45, that the power "may be exercised, not only where the safety, but also where the interest, or even the expediency of the state is concerned," about equally at fault. The subject is not, at this day, altogether at large. The power has been exercised so long, and has been so often subjected to judicial scrutiny, as to leave little difficulty in assigning its proper limits. It will be found, upon examination, that the necessity upon which the proper exercise of the power depends, relates rather to the nature of the property and the uses to which it is applied, than to the exigencies of the particular case in which it is 327] exercised. Nearly all personal *property, in time of peace, is excluded from its operation, because the state can go into market upon an equal footing with other purchasers, and supply its wants in that manner. But where lands, connected with precise localities, are needed for a public highway, or any of its necessary appendages, a case of public necessity is established; and it is no objection to the exercise of the power, that other lands, equally feasible, can be obtained by purchase.

These views necessarily lead to the conclusion that upon any question, bearing in any manner upon this case, connected with the appropriation of private property, it can make no difference whether the power is exercised directly by the state, for a work belonging to the state, or by a corporation as a public instrumentality, in the name and under the authority of the state: provided the work for which it is taken is public in its nature and uses, and is open to the use of the public, under reasonable regulations, as a matter of right and not merely of favor; and that it is enough to establish a public necessity, when it appears that lands are necessary for such a work, without going further and showing that it could not be constructed without the use of the particular property sought to be appropri-

ated. And this brings us to the precise question stated: Does the appropriation of land to be used for depot purposes, as well as the track of a railroad, fall within the spirit and purpose of this power? We see no reason to doubt it. The necessity for fixed property, situate in particular localities, is just as urgent and indispensable in the one case as in the other. Indeed, without the use of grounds upon which to receive and discharge freight and passengers, the track itself would be useless; and if the proceeding could only be referred to that provision of the constitution which specifically regulates the appropriation of a *right of way*, there could be very little doubt that such indispensable appendages to the use of the track would be covered by its terms. Nor does the argument that such an appropriation can not be made, derive any support [328] from the suggestion, that a fee is taken in the one case and a mere easement in the other, for the reason that when a fee is required, the power extends to its appropriation; and for the still more conclusive reason, that no such difference, in our opinion, exists. The use of the property is all the public interests require in either case, and consequently all that can be appropriated; but, being a perpetual and exclusive use, it may, and ordinarily does, cover the whole value of the property. The quantity of land that may be appropriated for this purpose is left, it is true, very indefinite. It is clear, however, that only so much can be taken as is *necessary* to be used in that manner. And with the power of the courts to prevent abuses, and the certainty that it can be held only so long as it is thus used, and can not be diverted to any other purpose, there may be little danger of attempts to get too much.

5. The last question presented relates to the rule of compensation adopted by the probate court.

Upon various questions arising upon the introduction of evidence, the court in effect held, that there should be excluded from the present value of the plaintiff's property so much as had been added to it by the construction of the railroad, and that he should have a verdict only for so much as the property would have been worth if the road had not been proposed or built. These decisions seem to have been based upon the idea, that the proceeding was to be governed wholly by section 5 of the corporation article, and upon the controlling effect of the word "irrespective," used in that section. While it is admitted upon all hands that property taken for any public use, without the intervention of a corporation,

must be paid for at its full value at the time it is taken, without any regard to the causes that may have contributed to make up that value, it seems to be argued or assumed by counsel upon both sides (but with different objects), that a different rule is established when a right of way is appropriated to the uses of a corporation, and that, 329] in such case, any increase of the *value of the property arising from the contemplated construction of the road, should be excluded from the compensation awarded: the one case, it is said, being controlled by section 19 of the bill of rights, and the other by the section above referred to; thus, in the construction of the same description of improvements, making the constitution discriminate in favor of corporations, and against the public; so that, if the state should undertake to make a free turnpike, it might be obliged to pay more, and the owners of property taken might be entitled to receive more, than though the same work was undertaken by a corporation, with the right to receive tolls for the use of the road when built. Upon this subject we have the misfortune to differ *in toto*, not only with the court below, but with counsel. We find nothing in the language, history, or purposes of either provision to warrant such a distinction; and we find it difficult to imagine a more palpable perversion of the spirit and object of section 5 of article 13 than such a distinction involves. To our understanding, these sections provide for no two rules of justice or obligation; but to every intent, and for every purpose, having the least relation to the present controversy, they are, in legal effect, identical.

Section 19 of the bill of rights commences with providing for the inviolability of private property, but declaring its subserviency to the public welfare, upon making a compensation in money to the owner. The balance of the section is taken up with directing how, when, and in what manner this compensation shall be ascertained and paid. As to the mode of ascertaining the amount, it provides: "Such compensation shall be assessed by a jury, without *deduction* for benefits to *any* property of the owner."

Section 5 of article 13 is confined exclusively to appropriations by corporations of the right of way; and provides that they shall not be made until *full compensation* therefor, to be ascertained by a jury of twelve men in a court of record, is "first made in money, or first 330] secured by a deposit of money, to *the owner, *irrespective* of any benefit from any improvement proposed by such corporation."

The identity of these provisions, as to the course of proceeding

required to ascertain the compensation to be awarded, has been settled by this court, in the case of *Lamb and McKee v. Lane*; in which it was held, that the jury referred to in the first of these sections, was the common-law jury of twelve men, and that such a jury belong to, and could exercise its functions only in, a court of record. The rule of compensation prescribed in this section for the government of the jury, has been rightly apprehended in the argument; but how a different rule is elicited from the language of the other section, is not easily perceived. By the one, the compensation is to be assessed "without deduction for benefits," and by the other, "irrespective of benefits;" and by each, a *full compensation* is required. Now, when is a man *fully* compensated for his property? Most clearly and unquestionably, when he is paid its full value, and never before. The word "irrespective" relates to this full compensation, and binds the jury to assess the amount, without looking at or regarding, any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken; which is but saying that nothing shall be *deducted* from that value on account of such benefits. The opposite construction, so far from requiring the assessment to be made *irrespective* of these benefits, in effect compels the jury to ascertain their value to the property, and to deduct so much as they have increased it; thus using a word introduced for the sole benefit of the property-holder, in such manner as to deprive him of a portion of the acknowledged present value of his property, or to allow him to be paid for a part of its value in benefits; and, at the same time, fastens upon the constitution the gross inconsistency of allowing a corporation to procure the right of way upon easier terms than could be done by the public.

*But, it may be asked, why was this section retained, if it [331 is identical with the section in the bill of rights? It might be more difficult to show an absolute necessity for it than to give it a proper construction. It will be remembered by those who are curious to trace its history, that each article of the constitution came from a separate committee, and redundant provisions were therefore almost unavoidable. In this instance, however, the section as originally introduced served a distinct purpose, and differed from that in the bill of rights, in requiring the money, in all cases, to be paid before the property was taken. It was afterward made to conform

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in this particular by amendment, and then retained by a direct vote upon a motion to strike it out. It was quite impossible to arrive at the motives of all those who voted to retain it; but it is certain that many considered it expedient to do so, for the purpose of foreclosing, by the implication it afforded, any question as to the power to appropriate property to the uses of a corporation authorized to construct a public improvement. We do not now say that it may not, in some possible particulars, differ from the section in the bill of rights; but upon the question now under consideration, the intention of the convention to make them alike is placed beyond all doubt, from the fact that it went to the committee of revision with positive instructions "to make the rule of compensation therein provided, correspond with that established" in the section of the bill of rights referred to. 2 Const. Debates, 850.

For these reasons, we are clear in the opinion that no such distinction as that attempted to be made, can be supported; and that the probate court wholly misconceived the true meaning of section 5 of article 13. That whether property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken—as much as he might fairly expect to be able to sell it to others for, if it was not taken—and that this amount is not to be 332] increased from the necessity of the public *or the corporation to have it, on the one hand; nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian; and without any regard to the external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct.

It would be unjust, because it establishes for a corporation what is done for no one else—a sort of right in the property of others, to the reflected benefits of its improvement; itself submitting to no reciprocity by affording others a compensation for the effect of their improvements, upon the property of the corporation. And it is doubly unjust where, as must very often happen, the increase in

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value accrued to the benefit of a former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price.

Upon the whole case, we are clear in the opinion that the probate court erred in the two particulars pointed out, and the court of common pleas in affirming its judgment. Both judgments are therefore reversed, and the cause remanded to the court of common pleas for further proceedings.

***MARTHA THOMPSON (ADMINISTRATRIX OF JAMES THOMPSON, [333 DECEASED,]) v. JACOB W. THOMPSON AND NELSON MCCOLLISTER.**

It seems to be a well-settled principle, that the purchaser of an unincumbered estate, if he agree to take it subject to the incumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the incumbrance, whether he expressly promise to do so or not—a promise to that effect being implied from the nature of the transaction.

A will is to be construed in the light afforded by the circumstances under which it was made, and the subjects to which it relates.

And its terms are not, of necessity, to be construed technically and with a strict reference to grammatical accuracy, but sensibly and liberally, in order to give effect to the testator's intentions.

Nor is it to be so construed as to destroy all benefit from a devise, if it can consistently be avoided.

A testator may, by an express direction in his will, charge his personal estate with the removal of an incumbrance upon his realty, although not personally bound for the debt; or, he may do so by dispositions and language that are tantamount to an express direction; as, where the continuance of the charge primarily on the land would be repugnant to some of the provisions of the will and defeat them. In this, as in other cases, the principal object of regard is the testator's intention.

If one person, upon a sufficient consideration, make a promise to another, for the benefit of a third person, such third person may maintain an action at law upon the promise.

ERROR to the court of common pleas of Pickaway county.

The plaintiff, as administratrix, with the will annexed, of James Thompson, deceased, in the course of her administration of said estate, in the year 1852, paid to the Ohio Life Insurance and Trust

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Company the sum of \$700, principal, and three installments of interest, amounting to the sum of \$87.30, being the amount then due on a mortgage to said company, made by Wm. Hamilton, in 1835, on lot No. 147, in Circleville, Ohio.

334] *On the settlement of her accounts with the probate court of said county, the defendants, being heirs and legatees of said deceased, excepted to this payment to the Trust Company, as they had notified the administratrix they should do, before the same was made. Their exceptions were heard and overruled by the probate court, and the payment allowed to the administratrix. The defendants appealed to the court of common pleas, where, upon final hearing, the decision of the probate court was reversed.

This petition in error was filed in the district court, by the administratrix, to reverse the decision in the common pleas, and the district court reserved the question presented, and sent it to this court for its decision.

The question in controversy arises upon the following agreed statement of facts:

"One William Hamilton, being the owner of lot No. 147, in Circleville, on the 17th of July, 1835, mortgaged the same to the Ohio Life Insurance and Trust Company, to secure the payment of \$700, loaned from said company. Said lot was afterward conveyed by Hamilton to J. L. Franklin, subject to said mortgage, and by Franklin to J. L. Green, subject to the same incumbrance. On the 27th of April, A. D. 1844, J. L. Green conveyed said lot to James Thompson, the testator—the consideration \$450; and the deed a general warranty, except as follows: 'Which said property is subject to the lien of a mortgage, to secure the payment of the sum of \$700, executed by W. Hamilton and wife to the Ohio Life Insurance and Trust Company (dated as above), and is hereby conveyed to said Thompson, subject to the lien and incumbrance of said mortgage.' In making said conveyance, the amount of said mortgage was deducted from the purchase money, and the consideration in the deed was for the balance of \$450. Said Thompson paid the semi-annual interest, due on said mortgage, from the time of his purchase till his death, and died on the 3d day of November, A. D. 1850, and, by his last will and testament, duly proved, etc., devised said lot, No. **335]** *147, to his daughter Lucinda; and it is admitted that the following clauses of said will are all that are applicable to the question in controversy, to wit:

"Item 1. It is my will that, out of my personal estate, my just debts be first paid, and that the residue of my personal estate be equally divided between my children."

"Item 5. I devise and bequeath to my daughter Lucinda Thompson, during the term of her natural life, lot No. 147, in the town of Circleville, and county of Pickaway, with the appurtenances thereto belonging. Also, 200 acres of land in said Yellow Bud tract, running across the same from east to west, parallel with Martha Ann's said tract, in said Yellow Bud lands. At the death of the said Lucinda, the said lot and 200 acres of land to be equally divided among her children."

"Item 9. In case any of my aforesaid children, to whom I have made devises, shall die without issue, it is my will that the property hereby devised to such one as shall die without issue, shall be held and enjoyed by the rest of my children then living, until the last of my children shall die, when the property thus held shall be equally divided among my grandchildren."

Page & Renick, for plaintiff in error, presented an argument, of which the following is the substance :

I. It is admitted as the rule in England, that if a man dies leaving a *debt of his own contracting*, which is a charge on his real estate, his personalty is the primary fund for payment. If he leaves real estate *subject to a debt contracted by another*, the heir or devisee takes such realty subject to the debt. In the case of a debt contracted by himself, his personalty is bound by it, unless he plainly manifests an intention to exempt it. In the case of a debt imposed on the realty by another, he must manifest an intention to charge his personalty, otherwise it is exonerated. The *intention* of the party from whom both funds proceed is the governing principle. Where an estate has been purchased **subject to a mortgage*, and [336 the purchaser remains entirely passive, the land continues subject to the charge, and neither the executor nor the heir of the purchaser is liable for the payment of it. Where the purchaser dies intestate, the charge can be thrown on his personal estate, as the primary fund only, by acts or circumstances evincing a decided intention to make the debt personally his own.

II. As to the acts and circumstances which are held to evince such intention, there is considerable conflict among the cases, and

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as the present case is one of a will, it is not necessary to offer a criticism upon the authorities.*

"As to wills, the result of the cases seems to be," says Chancellor Kent, "that the testator may, by express directions, charge such incumbrance on his personal assets; or even without express words, he may do it by dispositions and language that are tantamount; as if, for instance, the continuance of the charge primarily on the land, would be repugnant to some of the provisions in the will, and defeat them." *Cumberland v. Codrington*, 3 Johns. Cas. 372.

III. Thompson, the testator in this case, did not, by express directions, charge the mortgage in favor of the Ohio Life Insurance and Trust Company, upon his personal property; but he has done so by dispositions and language that are tantamount: the continuance of the charge on the land, would be repugnant to the provisions of his will. By the will, the lot was devised: 1. To his daughter Lucinda during life. 2. At her death, the said lot to be equally divided among her children. 3. In the event of her death without children, the said lot to be held and enjoyed by the rest of the testator's children then living, until the whole of them should be dead. 4. Upon the death of all the children of the testator, the said lot to be equally divided among all his grandchildren.

337] *It is perceived that the testator has carved several estates out of one inheritance, viz: first, an estate for life; second, a contingent remainder in fee simple; third, an executory devise for life; and fourth, an executory remainder in fee simple.

It is evident that this testator's intention was to keep this property in his family. He determined that it should not pass into the hand of strangers until every child of his was dead. None of his children had, upon any contingency, a fee simple; that is, the power to convey the premises in question to a stranger. Whether this provision in his will proceeded from attachment to that property, or distrust of the devisee, or a wish to provide for her and her children, in such a manner that improvidence, fraud, or accident could not deprive her of the bequest, it is not necessary for the court to determine. He had the power to dispose of his estate, according to his own inclination, and from motives sufficient in his own mind, he resolved to continue these premises in his family dur-

*The ablest case will be found in 3 Johns. Cas. 229, *Cumberland v. Codrington*, in which Chancellor Kent has cited and discussed all the cases.

ing a certain period. The fact that he did so determine, seems too evident for argument. Now, at the death of the testator, there was a large incumbrance on the estate which he had thus disposed of. That incumbrance was due, and it was to be extinguished by some person. If it was not to be discharged by his executor, then, upon whom rested the obligation to pay it? Upon the devisee of the life estate, or upon her children, who were not then in existence? Upon her brothers and sisters, who might never inherit; or upon their offspring, whose existence and inheritance were still more contingent and remote? Did the burden rest upon any single person, or all these persons? If upon more than one, in what manner was the debt to be apportioned? Is it to be supposed the testator intended that his daughter Lucinda should assume the incumbrance? Why should this duty rest exclusively upon her, when her interest was but a life estate, and the fee simple was devised to others? Will it be maintained that it was the duty of the remainder-men to pay the debt? It would not seem reasonable to require payment of them, *because their interest in the prem- [338] ises was contingent, and very distant. They might discharge the incumbrance and yet never enjoy the estate. Supposing the obligation to lie upon Lucinda Thompson, what would be the consequence of her neglect or inability to pay the mortgage? On the other hand, if the persons who are to enjoy the remainder of the estate should fail to pay it, what becomes of the inheritance? The direct consequence of a neglect, refusal, or inability of the devisee to pay the mortgage debt, would be a sale of the premises to a stranger in fee simple. A sale of the lot in fee simple would defeat the intention of the testator. Therefore, the continuance of this charge primarily on the land, would be repugnant to the provisions of the will. If so, it was the duty of the executor to discharge the debt out of the personal assets.

IV. It is deemed a valid argument, in constitutional law, to imply from the grant of a power the ordinary means of its enjoyment and execution. A power to create implies a power to preserve. A power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and preserve. Where the repugnancy exists, the hostile power must yield. By parity of reason, from a devise may be implied also a devise for the necessary and ordinary means of enjoyment and execution. To devise an estate for a certain purpose, is to devise the ordinary means of exe-

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cutting that purpose. To make a bequest subject to such infirmities as will inevitably destroy the purpose of the bequest is a gross repugnancy, which is never to be inferred. It is to be presumed that a testator would not leave it in the power of accident or fraud to defeat his intentions, especially where it is a matter of so little difficulty, by removing the incumbrance, to effectuate his purpose. It is, therefore, not an unnatural inference that he designed to remove all the obstacles in the way of executing his intentions, which he had the power to remove.

V. Estates may arise from implication—a plantation or square
339] *of buildings may be bestowed on a person by mere inference of law. 1 Jarman, chap. 17; Walker v. Whiting, 23 Pick. 317. If so, may not an incumbrance to the enjoyment of an estate be removed by implication? When that incumbrance must defeat the intent of the testator, by destroying the devise, is it not a fair inference that he did not intend the object of the devise to be disappointed of his bounty?

It is a rule in the construction of wills, that repugnant expressions must yield to an intention and purpose expressed or apparent upon the general context. With greater propriety we may affirm that an incumbrance, which it was a matter of choice with the testator to extinguish, and the continuance of which will inevitably defeat his intention, apparent in the general context of his will, is a repugnance which must yield and be removed. The court is bound to give effect to a devise wherever they can, and if one mode of construction will support the devise, and the opposite may defeat it, the latter must be rejected.

VI. But it may be objected that a superior title in a third person would, equally with an incumbrance, defeat the devise.

It is answered that the instances are not parallel. The devise of an estate subject to a mere incumbrance, and of one to which a third person has a better right, are not analogous cases. In the former case, the testator has a right to devise the estate; he can dispose of the premises, and the charge upon them is not inconsistent with the passing of fee. But when he attempts to devise an estate which belongs to another, no interest passes, and the devise is absolutely void. An executor can not be compelled to purchase an estate in which the testator had no interest, for the benefit of a legatee. But it is the duty of an executor, in most cases, to discharge a mere incumbrance on the realty.

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If the title to lands devised prove invalid, it is an accident or misfortune, not contemplated by the parties or law, and defeats beyond remedy, both the intention of the testator and the object of his bounty. The opposite counsel might, with as much reason, *reply that the will is defeated when the premises are swallowed up by an inundation or earthquake. [340

It may not be in the power of an executor, or the testator himself, to purchase or extinguish a superior title. The owner may obstinately refuse to receive ten times the value, and no court has authority to compel him. The case of a mere pecuniary incumbrance, a mortgage for money lent, is as different from the subsistence of a better title in another, as storm, flood, and fire are from human agency.

VII. Neither is a comparison to be made between this case and dower. Inchoate dower is not an incumbrance; for the covenant against incumbrances, it is held in Ohio, does not extend to it. It has no existence during the life of the testator. It is a mere possibility or contingent interest. It comes into existence after the husband's death, at the same moment with the devise, and, for a period, they co-exist. It never can, as an incumbrance or superior title, sweep away the estate. The dower of Thompson's widow can not by any possibility bring the premises devised to a judicial sale, but the mortgage may.

VIII. There is another fact in the case which may be of importance. The testator paid the interest on this mortgage during his lifetime, and in his will, directed that out of his personal estate his just debts should be paid. In point of fact, he regarded this debt as his own, dreaming little of the subtle discussions in *Cumberland v. Codrington*.

IX. But even if there was no will in this case, the decision of the court of common pleas is erroneous; for the rule which distinguishes between an incumbrance imposed on the realty by the deceased, and one imposed prior to his purchase, has never been adopted in Ohio.

It would be difficult to assign any reason for this distinction in the nature of things, in justice or policy. It never could have occurred to a legislator or jurist. No theorist in law would have dreamed of it. It is a mere whimsicality, the consequence of an *artificial reasoning so subtle as almost to escape the notice [341 of the understanding.

A distinction so destitute of reason must have originated, as did many rules of law, in some case of great hardship in which judges endeavored to escape from some rigid and unjust rule, the offspring of the feudal system.

Two reasons are usually assigned for the rule in question :

1. It is said in case of an incumbrance imposed by another, the purchaser *has not made the debt his own*—it is not his debt, and consequently his personalty is exonerated. This reason is false; for it is decided that if the purchaser expressly promises to pay the debt, yet it remains an exclusive charge on the realty; that the fact of making a promise to pay the debt does not charge the personal assets. But does not the purchaser by such promise make the debt his own in every legal sense? May he not be sued upon the promise, and his personal and real property taken in execution? If so, how can it be said that the purchaser has not made the debt his own?

In all cases where the buyer takes the land subject to a mortgage, as Thompson did in the present instance, whether he covenants with his vendor or not, to pay the incumbrance, he is bound without any specific contract to indemnify him. If so, as between the vendor and purchaser, the incumbrance becomes, to most intents and purposes, the debt of the latter. Such was the language of Lord Thurlow, in *Tweddell v. Tweddell*, 2 Bro. 101, 152; *Felsh v. Taylor*, 13 Pick. 133; *Swasey v. Little*, 7 Pick. 296; *Ewen v. Jones*, 2 Ld. Raym. 937.

If the court are convinced that the purchaser of an incumbered estate, *in point of fact*, makes the debt his own, at least to certain intents and purposes, then is not his executor bound (under section 83, Swan's Stat. 353) to discharge the incumbrance as much as any other debt of the deceased?

2. Another reason commonly given, is this: Where the incumbrance was placed on the land before it came into the hands of the purchaser, his personal estate is not augmented by the debt, and therefore should not bear the charge.

This reason is also untrue; for in many cases, if not in all, the purchaser of the incumbered estate receives the benefit of the incumbrance in the diminished amount of purchase money paid by him. He assumes the charge on the realty, and retains in his own hands the amount of the incumbrance, instead of paying it to the vendor. His personal estate is therefore directly augmented.

I suppose the real cause of the difference taken between a debt contracted by the deceased himself, and by another, is this: In England all the lands descended to the eldest son, and the personal estate was distributed equally among all the children. This rule of law arose from a disposition to cherish a landed aristocracy. No matter however great the landed estate, it descended to the eldest son, without being subject to the debts of the deceased; and his personalty, after paying his debts, was divided among his offspring.

To remedy this hardship, in later times, judges sought by this distinction to cast the burden on the heir, and relieve the remainder of the children. They attempted, as they did in many other instances, to escape from the operation of a hard rule of feudal law, by an artificial distinction.

All the English cases evince a decided struggle, on the part of the courts, against reason and common sense, to cast the burden of the incumbrance upon the heir, and to relieve the personal assets for the benefit of the younger children.

Taking this view of the origin of the rule, there might have been cause for resorting to the distinction in *England*. But in this country, where the whole estate of the deceased descends equally to all his heirs, the rule in question is not merely a senseless technicality, but it is a positive evil. It is an evil because it is an unnecessary multiplication of artificial rules of law. And it is an evil because no testator, except a lawyer, is aware of the existence of the law, and dying in ignorance of it, he may neglect *to [343 exonerate from the incumbrance real estate which he may have devised, thereby doing injustice to one legatee and bequeathing him a worthless inheritance.

If, when the reason for a law ceases, the law ceases, then there is no cause for an enlightened court at this day, to declare that the rule in controversy shall be in force hereafter in Ohio. Jarman (2 vol. on Wills, 563, 564, 1 Am. ed.) regrets that the rule was ever established in England.

C. N. Olds, for defendant in error, presented an argument, of which the following is the substance:

I. The indebtedness of the Trust Company was not an incumbrance placed on the lot by the testator, but was contracted by Hamilton nine years before Thompson purchased. It had been con-

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tinued while the lot passed through the hands of two prior purchasers, and it remained till Thompson's death the debt of Hamilton, charged, however, upon this particular property. Neither Thompson nor any one else had ever agreed with Hamilton to pay this indebtedness for him. All the purchasers subsequent to Hamilton had ever done to connect themselves with the debt, was to receive the lot with the knowledge that it was subject to, and charged with, this incumbrance, and to keep the incumbrance to its original amount; by the payment of the semi-annual interest accruing thereon.

Under this state of case, the rule of law, as settled by all the authorities extant, both English and American, is, that this incumbrance follows the real estate, as devised, and remains a charge upon it in the hands of the heir. 2 Jarm. on Wills, 557-559 (marginal).

The same principle is laid down, in a still stronger form, in *Lechmere v. Charlton*, 15 Ves. 197, 198 (marginal).

In *Cumberland v. Codrington*, 3 Johns. Ch. 228-235, the whole question in all its bearings, is discussed, in a most elaborate and masterly manner, by Chancellor Kent. The summary of his 344] *decision in that case is much stronger than is required to sustain the case at bar.

The same doctrine is adopted and approved by the Supreme Court of the United States, in *McLean v. McLellan*, 10 Pet. 625.

In the examination I have given this case, I have not been able to find a single authority, either in England or America, that is in conflict with, or disturbs in any degree, the course of the decisions and authorities above quoted. It is an unbroken and uniform current, flowing in the same channel through the equity jurisprudence of both countries. As counsel upon the other side have equally failed to find any such conflicting authorities, I think it is safe to adopt the language of the United States Supreme Court, in 10 Peters, and say, "*there is no doctrine better established.*"

II. But counsel for plaintiff would escape the force of this "*well-established doctrine,*" by attempting to show that Thompson, the testator, *intended by his will* to charge this Trust Company debt upon his personal estate.

There is no doubt that Thompson, by his will, might have made this debt a charge upon his personal estate. In the language of Chancellor Kent, he might have done so, "by an express direction

in his will, or by dispositions or language equivalent to an express direction." But *has* he done so?

This inquiry raises a question of *intention*, and that intention is to be sought for in the terms of the will itself. It may appear, from what the testator has there said, or it may appear equally well from what he has *not* said.

It is not claimed that there is any *express* direction in the will that this debt should be paid out of his personal estate. Certainly no such direction is contained in item 1 of the will, which provides "that his just debts shall be first paid out of his personal estate;" for the testator had never, either directly or indirectly, made this debt his own. The Trust Company could not sue him for it. They had no claim whatever upon him personally. Their right of action was upon the bond and mortgage of Hamilton. If *he* (Hamilton) failed to pay the bond, when called on for [345] payment, they could then assert their claim, through the mortgage, *against the lot*, but not against Thompson.

Is there any other direction to pay this debt contained in any other item of the will? Certainly not. The fact is, in the entire will, from the beginning to the end of it, not a single allusion is made to this Trust Company debt, in any form whatever. Is there any reason for this silence? Can the *intention* of the testator be found in what he has *not* said? I think it can, and that very clearly.

This mortgage to the Trust Company had rested upon that lot, at the time of Thompson's death, for more than fifteen years. It had been on the lot, in the hands of three different owners, for nine years before he purchased it. He bought subject to this incumbrance. He knew very well that the deed from Green to himself gave him title only to such interest in this lot as might remain after the prior incumbrance to the Trust Company was satisfied. The only estate he took by his deed was *the equity of redemption*. He held this title voluntarily for six years. He could at any time have paid off the mortgage, and secured the absolute title in fee to himself; but he preferred to hold it otherwise, as the two owners before him had done. He found it to his advantage, doubtless, not to pay off the incumbrance, as he had the possession and enjoyment of the entire property, by the payment of the interest only on a large portion of the purchase money. And when he made his will, and gave this lot to his daughter, he devised to her exactly what he had pur-

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chased for himself, and what he had chosen to hold for six years,—that was, this equity of redemption, and nothing more. It was all the interest in that lot he *could* give, for it was all he ever possessed. He might have directed his executor to buy the fee-simple for her by paying off the mortgage, *but he did not*. He might have lifted the mortgage himself after the devise was made, for his will bears **346]** date almost two years before his death; *but he did not*. *The fact that his will is utterly silent as to this incumbrance is, under all the circumstances, a most significant fact. This very *silence* declares his *intention*, clear as any language could have expressed it. If it had been his intention to give this lot to his daughter, *clear of the incumbrance upon it*, there was an obvious necessity for him to say so; but if he intended to give her exactly what he had himself possessed, there was no allusion to the mortgage required, and his will should have been worded exactly as it is.

III. Counsel for plaintiff assume, *erroneously*, that this incumbrance had to be extinguished by some person. On the contrary, there was no one asking for its extinguishment. It had been due for the last fourteen years, and yet the Trust Company had not demanded its payment. It was expressly understood, when the debt was created, that it was not to be paid at maturity. These Trust Company mortgages, as a matter of public notoriety, differ widely from an ordinary mortgage debt. The loan and incumbrance assume more of the character of a perpetuity than any other form of indebtedness in Ohio. The object of the company is to secure a permanent investment of its capital, and its interest is promoted by a continuance of the incumbrance as long as possible. The owner of the land also finds it equally to his advantage to let the incumbrance remain upon it; for, while he paid only for the equity of redemption (that is, for the residuum after the mortgage had been deducted), he has the actual possession and enjoyment of the entire property, and this possession and enjoyment fully compensate him for the payment of the interest accruing on the mortgage. This matter Thompson well understood, for he had practiced upon it for six years; and the fact that he must have understood it, gives character to this devise in the form he has made it. Silence as to the incumbrance is not evidence of an oversight or omission of what he intended to say. This very silence, as I have before said, speaks forth his intention.

347] *IV. But counsel for plaintiff insist, that the intention of testator is shown by the fact that he has, in his will, carved out of

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this lot, as devised, *four particular estates*, which may be defeated if the Trust Company mortgage is not paid off by the administratrix. To this proposition, I may reply—

1. If the testator had so little knowledge of legal technicalities that he “never dreamed of the subtle discussions in Cumberland and Codrington,” how could he have ever apprehended all the nice technicalities which counsel throw around these four particular estates? We are now seeking for the *intention* of the testator; and I venture to assert that he had never heard so much as the *names* of these four particular estates in all his lifetime; and if they had been named in his hearing, he could not have understood their meaning and legal attributes. It is idle, therefore, to suppose that he *intended* to protect estates of whose existence and attributes he had never dreamed.

2. Again, why must these estates be defeated, if the Trust Company mortgage is not paid off? Can they not exist together? Is this incumbrance inconsistent with the life estate of Lucinda Hall, which she receives by the will, or with the other three estates therein created? Are not the possession and enjoyment of the *entire property for life* a sufficient inducement for her to pay the annual interest on the Trust Company debt? It was inducement enough to her father, why not to her? If the Trust Company could, as counsel for plaintiff suggests, force a sale of the premises in case the interest was not paid, and thereby pass the title in fee simple to a stranger, it only shows a still stronger inducement to the devisees to keep this incumbrance under their own control.

3. But, again, the estate in this lot, which the testator received by his conveyance from Green, was, in his estimation, a valuable estate. He estimated this equity of redemption, at the time of his purchase, at \$450. The increased value which he had afterward added to it, by buildings and other improvements, *does not [348 appear in the agreed statement of facts; but it does appear that he desired to keep this property in his family, and its increased and increasing value may be safely inferred. His daughter, then, takes by the devise a valuable estate for life—valuable in spite of the incumbrance; the residuum, after the mortgage should be paid off by her, would be a worthy gift for a father to bestow and a daughter to receive. The devise, then, can not be defeated, even were she compelled to pay this mortgage.

The same reasoning applies with equal force to the other three

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estates; and more especially when we remember that all these estates are to be enjoyed in the testator's own family, among his children and grandchildren.

4. But still, again, an examination of item 5 of the will shows that this devise of lot No. 147, is coupled with a devise of 200 acres of land to the same party. The lot and the land together constitute the devise. It is an entire thing. They are together in the mind of the testator, and they descend together. The four estates, named by counsel, are carved out of the lot and land together, as one thing. Suppose, then, the title to the lot should fail entirely, or that the incumbrance to the Trust Company should consume it wholly, does that defeat the devise? Does not the land remain, and does not the devise operate upon it? How, then, can it be said that the extinguishment of the mortgage by the heir will be repugnant to the terms of the will and defeat the devise? It might as well be claimed that if the title to *ten acres of the two hundred* should fail in the hands of the devisee, therefore the whole devise must be defeated.

5. But there is a more general reply to this proposition.

It will not do for an executor or administrator to *infer an intention* of the testator, that he should pay out money of the estate, in all cases where a devise might otherwise be defeated. There may be an outstanding title in a stranger, by which a devise may be wholly [349] defeated, and yet the administrator can not buy in *that title to protect devised premises. The life estate of Lucinda Hall in these premises might be forfeited and wholly lost to her, under our statute (Swan, 935), by the non-payment of taxes; but the administratrix could not pay these taxes out of the personal estate, to prevent this devise to her from being thus defeated. The devise may fail, or be defeated, in a variety of ways; but the administrator has no right to interfere, unless the *intention* of the testator to that effect appears by "*an express direction, or by dispositions or language equivalent to an express direction.*" In other words, the *intention* of the testator must be so apparent, that it is in reality a *command* to his administrator to do as the testator has willed. The administrator can create no new liabilities for the estate he represents; he can assume no new obligations. The rights of all parties concerned are settled and fixed by the will and the death of the testator. The administrator holds a trust, to be administered impartially, for all concerned. He stands between the creditors and the heirs, respon-

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sible alike to both. The rights of those entitled to the personal estate are as much under his protection as are the rights of devisees of the real estate. The law knows no favorites; and the administrator is a mere creature of the law, to do its bidding.

THURMAN, C. J. It seems to be a well-settled principle, that the purchaser of an incumbered estate, if he agree to take it subject to the incumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the incumbrance, whether he expressly promise to do so or not—a promise to that effect being implied from the nature of the transaction. *Tweddell v. Tweddell*, 2 Bro. C. 154, margin; *Woods v. Hungerford*, 3 Ves. Jr. (Sumner's ed.) 132, margin; *Waring v. Ward*, 7 Ves. Jr. (Sumner's ed.) 337, margin; *Earl of Oxford v. Lady Rodney*, 14 Ves. Jr. (Sumner's ed.) 423, margin.

In the case before us, the agreed statement of facts is somewhat *defective in not expressly showing whether there was an [350] abatement in the price, on account of the mortgage to the Trust Company, upon the sales from Hamilton, the mortgagor, to Franklin, and from Franklin to Green; nevertheless, we think that this ought to be presumed from the admitted facts, that both conveyances were expressly subject to the mortgage, and that Green, in selling to Thompson, deducted the amount of the mortgage debt from the value of the lot, and made his conveyance expressly subject to the incumbrance. It is difficult to see why he made this abatement, unless he was bound to indemnify Franklin, or how he could be thus bound if the latter was under no obligation to indemnify Hamilton. For if there was no such liability, then Hamilton—not only as between himself and the Trust Company, but also as between himself and those claiming under him—was bound to pay the mortgage debt; and if he was able to do so—and there is no showing, in the case, to the contrary—the value of Green's estate was the full value of the lot; and it is not to be presumed that he would take less for it; much less, that he would abate over two-thirds of it.

Indeed, these conclusions are not gainsaid by the defendants' counsel, for he does not deny the liability of either Franklin or Green; and the scope of his argument seems to admit it. Without laying any stress, however, upon this fact, we think their liability ought to be presumed for the reasons already stated.

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That Thompson became bound to indemnify Green is sufficiently obvious, and as Green was under a like obligation to Franklin, and the latter under a similar liability to Hamilton, the mortgagor, it follows that the only *just* method by which Thompson could perform his duty, was to discharge the mortgage debt. For although, as between the Trust Company and these several parties, it was Hamilton's debt; yet, as between Hamilton, Franklin, Green, and Thompson, it was, equitably, Thompson's debt. And so he treated it, for he paid the interest on it to the Trust Company, from the 351] date of his purchase to the time of his death; and *it does not appear that he ever asserted a claim against any one for reimbursement.

In the meantime he made his will, by which he directed his just debts to be paid out of his personal estate, and devised this lot to his daughter Lucinda, then sole and unmarried, for her life, with remainder in fee to her children, should she die leaving any; but if she should leave none, then to his other children, and the survivors and survivor of them, for life; and the remainder in fee to his grandchildren.

Upon this will—in the light afforded by the circumstances under which it was made and the subjects to which it relates—we are to decide, whether the testator designed to provide that the mortgage debt aforesaid should be paid out of his personal estate. And we are unanimously of the opinion that he did, and that he employed adequate terms to effect his intention. He expressly directed his just debts to be paid out of his personal estate; and although it may be true that, technically speaking, this was not his debt, yet this is by no means decisive of the question. The terms of a will are not, of necessity, to be construed technically and with a strict reference to grammatical accuracy; but they are to be viewed sensibly and liberally, in order to give effect to the testator's intentions. Of all the instruments that need the benefit of a liberal construction—a construction that prefers substance to mere form—wills need it the most.

Now we have seen that, substantially, this was Thompson's debt; that, justly and equitably, it was his, and that he must have so regarded it. What is more natural, then, than that he should call it, what he believed it to be, his debt, and that he should suppose it to be included in a direction to pay his debts? That he did so suppose, we entertain no serious doubt. Not only for the

reasons already given do we think so, but these reasons are greatly strengthened by the other provisions of the will. The testator knew that the Trust Company could demand payment whenever it chose to do so, and that, if payment should not be *made, [352 the mortgage would be foreclosed and his devisees lose the estate. And although he might not have anticipated a speedy demand, yet he surely could not have presumed that it would be deferred until Lucinda's death, and the enjoyment of the estate by her children, should she leave any; much less could he have supposed that it would be delayed until the fee should vest in his grandchildren, should that event occur. And yet, by his various devises, he manifested the strongest possible wish that the property should remain in his family—giving to none of his own children, in any event, more than a life estate, and limiting the fee to some, or all, of his grandchildren. This intention, so clearly exhibited and so well effectuated by various provisions, is wholly inconsistent with the idea that he meant that his devisees should have nothing but the equity of redemption. And besides, had that been his design, it is altogether probable that he would have said, in express terms, that they were to take subject to the mortgage. He had so taken, with a clause to that effect in his deed, and he would very likely have inserted a similar clause in drafting his devise; for it will hardly be imagined that he omitted to do so because he supposed it unnecessary. We have no reason to think that he was at all versed in the subtle distinctions and recondite learning that appear in the arguments before us, and that it was owing to his legal lore and sound judgment that he omitted what would have made his intention perfectly manifest. We can well enough understand how he could call that his debt, which he regarded as such, and which was so in reality, though not technically, and, therefore, why it is that we do not find it specially provided in the will that his executors should pay it; but that he omitted to say that his devisees should take the lot, *cum onere*, because he knew that the law would cast the burden on them if he did not expressly shift it, is what we do not believe.

We have seen that it was the intention of the testator to keep the property in his family, and that he could not reasonably expect that the collection of the mortgage debt would be deferred *until the remainder-men should come into possession. It [353 follows, that if he designed to devise the estate, *cum onere*, he ex-

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pected the incumbrance to be removed by his daughter Lucinda; for he could not suppose that it would be removed by those to whom he had *contingently* devised a mere estate for life. But is it reasonable to believe that he expected her to discharge it? It amounted to over two-thirds of the value of the lot, and required a considerable sum of money to pay it off, and she was to have but a life estate. To discharge it would be to pay more than the life estate would be worth, and the devise to her would be an injury instead of a benefit. At least this is the presumption arising upon the agreed statement of facts, and that is all we can look at. But a will is not to be so construed as to destroy all benefit from a devise, if it can consistently be avoided. "As to wills," said Chancellor Kent (in *Cumberland v. Codrington*, 3 Johns. Ch. 372), "the result of the cases seems to be, that the testator may, by express directions, charge such incumbrance upon his personal assets; or, even without express words, he may do it by dispositions and language that are tantamount; as if, for instance, the continuance of the charge primarily on the land, would be repugnant to some of the provisions of the will, and defeat them."

I have so far considered the case upon the assumption that Thompson did not expressly promise Green to pay the debt, that view of the case being the most favorable one for the defendant in error. If he did make such a promise, it was upon a sufficient consideration, and an action of assumpsit could have been maintained upon it by the Trust Company—it being well settled, "that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action at law on that promise." *Cumberland v. Codrington*, 3 Johns. Ch. 254, and cases there cited; *Crumbaugh v. Kugler*, 3 Ohio St. 549. And if such were the case, there could be no doubt that Thompson was a debtor for the money, and that his liability was covered by the clause in his will directing 354] his debts to be paid. But it is, to say the least of it, doubtful whether the agreed statement of facts would warrant us in finding that such an express promise was made, and we prefer to place our decision on the other view of the case, with which we are entirely satisfied.

The judgment of the common pleas must be reversed.

BENNET LEWIS v. GEORGE W. EUTSLER AND OTHERS.

H. C. P. died in 1852, intestate, unmarried, and without issue. He was a bastard, and survived his mother, who left other children, the fruit of a marriage contracted after the birth of the illegitimate. The children last named survived H. C. P. The act of 1853, "regulating descents and the distribution of personal estates," was passed while the estate of H. C. P. was in course of settlement, and before distribution: *Held*, that whatever might be the rule under the operation of the act of 1831, had the settlement and distribution been made before the passage of the act of 1853, the last-named enactment operated upon the distribution of the estate, prevented the escheat to the state, and entitled the surviving children of the bastard's mother to his estate.

PETITION in error, filed to reverse a judgment of the district court in Greene county, affirming a judgment of the court of common pleas—the last-named judgment reversing an order of the probate court.

The facts, as stated in the petition in error filed by the present defendants in the court of common pleas, were, that one Catherine Blume, of the State of Virginia, then being unmarried, had issue, an illegitimate son, known by the name of Henry C. Perkey; that the said Catherine afterward intermarried with one Henry Eutsler, by whom she had issue—plaintiffs—George W., John Eutsler, Abigail Fankersley (late Eutsler), Mary Welch (late Eutsler), and Nancy Jane Semplin (late Eutsler), and died, leaving the above-named children, and also the said Henry C. *Perkey, surviving her; [355 that said Henry C. Perkey died in the year 1852, unmarried and without lawful issue; that the said Bennet Lewis was, by the probate court of Greene county, appointed administrator of said Perkey's estate; that on the 14th day of October, in the year A. D. 1853, the said Bennet Lewis filed his account for final settlement; on which such proceedings were had, that the said court of probate determined that there remained in the hands of the said administrator, to be accounted for, the sum of four thousand six hundred and thirty-six dollars and sixty-nine cents. And thereupon, on the 21st day of October in said year, the plaintiffs came into court, by S. & R. Mason, their attorneys, and moved the court for an order of distribution of the balance of said estate to be made to them, upon their causing a bond to be executed according to law. And there-

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upon, afterward, to wit, on the 12th day of November of said year, after argument by Howard & Munger, attorneys for B. Lewis, and M. D. Gatch, prosecuting attorney for the State of Ohio, the said court overruled said motion, upon the grounds that the said children and heirs of said Catherine Eutsler, are not entitled to succeed to the estate of Henry C. Perkey, who died without heirs. To which ruling the plaintiffs, by their said attorneys, excepted.

The court of common pleas reversed the order of the probate court. On a petition in error, filed by the present plaintiff in the district court, the court last named affirmed the judgment of the common pleas.

R. F. Howard, for plaintiff in error.

S. & R. Mason, for defendants in error.

RANNEY, J. Individually, I am very far from being satisfied with the construction put upon section 12 of the act of 1831, in the case of *Lessee of Little v. Lake*, 8 Ohio, 289, founded upon the authority of *Stevenson's Heirs v. Sullivant*, 5 Wheat. 207. That section 356] provides: "Bastards shall also be *capable of inheriting, or of transmitting inheritance on the part of their mother, *in like manner as if they had been born in lawful wedlock.*" Both the cases referred to agree in holding that the language of the statute is only sufficient to remove the common-law impediments to a lineal inheritance, leaving the illegitimate child, subject to all the disabilities of bastardy, as to his collateral kindred. But they seem to differ in one important particular—the last treating the statute as having been designed to restore the current of inheritable blood, so as to enable him to transmit inheritance, in the descending line, and to inherit directly from his mother, or, by right of representation, to take any property "which would have vested in her, as heir to any of her ancestors, had she lived to take as such;" while in the first it is said that "the expression on the part of the mother does not carry the mind beyond the mother, unless connected with words of more comprehensive meaning—such as ancestors on the part of the mother, or descendants on the part of the mother." The one would seem to leave the lineal inheritance wholly unembarrassed; while the other would rise no higher than the mother, and confine the effect of the statute to an inheritance *to* or *from* her, in the direct line. If great strictness is to be indulged, there is

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little difficulty in seeing that it is most judiciously applied in the Ohio case. For, if the bastard can not be said to be related to the children of his own mother, I can see very little reason in making him related to a grandfather, or some more remote ancestor.

The narrow construction adopted in both these cases is said to be founded upon the settled meaning of the expression, *ex parte materna*, when used in reference to the course of descent of real property in the English law. I may not fully understand what rule is intended to be here invoked. I know of none but that strict rule of feudal policy embodied in the fifth canon of descents, which confined the estate to the blood of the first purchaser. If the estate came through the paternal line to the person last seized, *it [357 should never descend to the one in the maternal; and, *e converso*, if it came through the maternal line, it should never descend to one in the paternal, but should rather escheat to the lord of the fee. Very anciently, it is true, a *feudum novum* could only descend to the lineal descendants of the first acquirer. But more than a century before the passage of our statute, this harsh rule of a military system had been entirely abrogated in England; first, by granting a *feudum novum* to be held *ut feudum antiquum*; and finally, by considering every acquisition of an estate in fee simple by purchase, as a *feudum antiquum*, or feud of indefinite antiquity; thereby enabling the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, to succeed to the inheritance. 3 Cruise's Dig. 380.

But let it be granted (what, I think, no amount of industry could prove), that a part of the language of our statute is a tolerable translation of words which imported an exclusion of collaterals, in the English law, and still but little is done toward arriving at the intention of the plain men who passed the act of 1831—four-fifths of whom were ignorant of the existence of any such rule, and of the language in which it is expressed. To find what they intended, it is necessary to consider all they have said, and to interpret it in accordance with the usual and ordinary signification of the language employed. When this is done, I find it impossible to doubt, that it was intended to abrogate the common-law doctrine, so far as to declare that the bastard, instead of being *nullius filius*, should thereafter, in law as in fact, be *the son of his mother*; and as such, not only capable of receiving inheritance directly from her, and of transmitting inheritance directly to her, but also, through

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her as the common ancestor, from or to any one of her blood "in like manner" (to use the language of the statute) "as if he had been born in lawful wedlock." I find myself confirmed in the view I have expressed, by the unanimous judgment of the Supreme Court 358] of Vermont, in *Town of Burlington v. Fosby, 6 Vermont, 83, upon a statute nearly identical with ours; and by the weighty opinion of Chief Justice Reeve, in his treatise on the law of descents, p. 96, where he says: "By the terms, *on the part of the mother*, we are to understand not only that the mother may inherit to the illegitimate children, and the illegitimate to the mother, but that any relative on the part of the mother may inherit to the illegitimate child, and the illegitimate child may inherit to any relative on the part of the mother."

Concurring fully in this construction, I should have felt bound, notwithstanding the high respect I entertain for the courts that have held otherwise, to have affirmed the judgment, did the whole case depend upon the act of 1831.

But I agree with the court, that it does not necessarily depend upon that act; and that all difficulty has been removed by the act of March 14, 1853, regulating descents and the distribution of personal estates. 3 Curw. Rev. Stat. 2270. What is the case before us? Henry C. Perkey was the illegitimate son of Catherine Blume, and having survived his mother, died in the month of January, 1852, without issue, unmarried, and intestate, leaving about six thousand dollars in personal property. After his birth, she intermarried with Eutsler, and had issue, one son and three daughters. The property is claimed by them as the lawful heirs of Perkey, on the one hand, and by the state, or rather by the agricultural society of the state, as an escheat, on the other.

A man needs little more than his instincts to determine what the law ought to be in such a case. Perkey had no election whether he should be born legitimate or illegitimate. It was no fault of his that he was born illegitimate, and he had the same right as others, whose origin was more fortunate, to be judged by his own personal conduct, and not only protected in the enjoyment of what he should acquire while he lived, but to have what remained of it transmitted to his blood when he died. In his case, as in others, such security 359] furnished the strongest possible *stimulus to that industry and economy, upon which the prosperity of states depends; and,

for the most cogent reasons, precluded the state from intervening to impair it.

Very good reasons, founded upon public policy, and growing out of the uncertainty that must generally attend the paternity of the illegitimate child, can be given, for cutting him off from all connection with the paternal line. To this necessity, he must submit. But no doubt can exist as to the identity of the mother. The child is necessarily reared by her; and between them, as well as between the child and her other children, must grow up those strong ties which bind near kindred to each other. However sternly the law may declare that there is no relationship, nature will assert her supremacy, and stamp the declaration as unfounded.

The most subtle ingenuity would fail to suggest even a plausible reason why these persons should not inherit to each other; and the state could in no way prevent it, and take the property from them, without incurring the imputation of gross injustice.

These considerations, I am very well aware, are in no way decisive of the true construction of either the act of 1831 or of 1853. But a construction that ignores their influence, upon those who enacted these laws, may well be doubted; and hence arises the legal principle, which requires doubtful or equivocal language to be so construed as to avoid absurd or unjust consequences; and it is with that view, that I present them.

Upon the disputed question arising upon the act of 1831, section 15 of the act of 1853, has removed all doubt, by adding: "And if the mother be dead, the estate of such bastard shall descend to the relatives on the part of the mother as if the intestate had been legitimate,"

If the case is to be governed by this act, there is no difficulty; and whether it is to be so governed, must depend upon a fair construction of all its provisions, taken and considered together. In no other way, can the intention of the general assembly be ascertained.

*Perkey died before this act was passed; but it took ef- [360]fect while the estate was in the course of settlement, and before any order of distribution was made. By section 21, the act of 1831 is unconditionally repealed. Section 22 provides: "This act shall not affect any estate, to which any natural person shall have become entitled, by or under any statute of the state heretofore in force; but this section shall not apply to escheats to the state."

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Now, it is perfectly evident that the whole of this section is a mere saving clause to the operation of section 21; and it is equally clear, that the general assembly did not intend to save for the state all the rights that it intended to save to natural persons; that a distinction was intended between the right to an escheat, and other rights of natural persons, derived from the act of 1831.

All the rights of the state to this property, were derived from, and depended upon, that act, and, in repealing it, the legislature has very plainly said, not only that they should not be saved, but that they should be relinquished. In so saying, no principle of justice, constitutional power, or legal propriety has been invaded.

The clause added to section 15, of the act of 1853, contains a very distinct acknowledgment of the injustice of the act of 1831, or of the construction put upon it. No constitutional impediment existed to prevent an instant correction of this injustice, by relinquishing all rights under it. While the vested rights of private persons, and of private corporations, are very properly placed beyond the reach of the general assembly, its power over such public interests is left wholly unrestricted. Indeed, if the state had actually received the property, there would have been no difficulty in restoring it to those justly entitled to it.

There is certainly nothing in the act of 1853, that evinces an intention to make it retrospective in its operation; nor was it necessary that there should have been. When Perkey died, the legal title to all his personal property vested in his personal representative. *He alone could sue for and recover it, and convert it into money. It vested in him, it is true, as a mere trust estate, for the benefit of creditors and distributees. The right to distribution was a vested right, and if it had belonged to a private person, could not have been impaired by subsequent legislation. In such case, the distribution must have been made according to the law in force when the right accrued; but it belonged to the state, and she had unlimited control over her own interests. Before the time for distribution arrived, she had repealed the only law that ever placed her in connection with the estate, and had expressly provided that her rights should *not* be saved. By another part of the repealing act, she had put the defendants in error in such connection, and had, in effect, ordered the distribution to be made to them. The whole effect, therefore, of these sections of the act, was to operate the relinquishment of an interest then existing, and to create a ca-

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capacity in others to take it. I am well enough satisfied that this construction carries out the intention of the general assembly, but I should be better satisfied to decide the case upon what I must still consider the proper construction of the act of 1831.

We do not find it necessary to pass upon the question raised by counsel, as to whether section 4 of the act of 1853 could, consistently with section 16 of article 2 of the constitution, have effected an implied repeal of the act of February 8, 1847. (2 Curw. Rev. Stat. 1342.) By this act, escheated property was to be taken possession of by the auditor of the county, and converted for the benefit of the state agricultural fund; while the act of 1853 required the prosecuting attorney to collect it, and applied it to the exclusive support of common schools, without expressly repealing the act of 1847. Before either officer could act, or either fund be replenished, escheated property must exist. Being merely public instrumentalities, it was within the power of the legislature to take it from the one and give it to the other; or to do what we think has been done, *take it from both and give it to those better en- [362] titled, by relinquishing the right of the state to the escheat. When property is found undoubtedly escheated to the state, it will be time to decide which of these funds can make the best claim to it.

The judgment of the district court is affirmed.

N. W. GRAHAM & Co. v. W. H. DAVIS & Co.

A common carrier, by special contract with the owner of goods intrusted to him, may so far restrict his common-law liability as to exonerate himself from losses arising from causes over which he had no control, and to which his own fault or negligence in no way contributed.

But he can not, by such stipulation, relieve himself from responsibility for losses caused by his own negligence or want of care and skill.

In an action against a carrier, upon a bill of lading containing an exception of the dangers of the river navigation and inevitable accidents, after the non-delivery of the goods is shown, the burden of proof is upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it.

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A loss by negligence, however slight, is not within the exception, and the carrier is liable.

A party upon whom the affirmative of an issue devolves is bound to give all his evidence in support of the issue in the first instance; and he can only give such evidence in reply as tends to answer the new matter introduced by his adversary.

Any relaxation of this rule is but an appeal to the sound discretion of the court in which the issue is tried, and can not be reviewed on error.

ERROR to the district court of Muskingum county.

W. H. Davis & Co., the plaintiffs below, brought an action of assumpsit against N. W. Graham & Co., the defendants below, which went by appeal to the district court of Muskingum, where they recovered a judgment for \$2,620.18 damages, and \$194.94 costs; to reverse which judgment this petition is filed.

363] *The third count of the declaration, and the bill of exceptions, are all the parts of the record necessary to be read for an understanding of the case.

The said third count reads as follows:

And for that whereas, also, the said defendants afterward, to wit, on the 10th day of November, A. D., 1852, at Pittsburg, to wit, at the county of Muskingum aforesaid, were the owners and proprietors of a certain other steamboat, to wit, a certain other steamboat called the "Dan Convers," used and employed in carrying and conveying passengers, and goods and merchandise, on the waters of the Ohio and Muskingum rivers, to wit, from Pittsburg, in the State of Pennsylvania, to Zanesville, in the county of Muskingum aforesaid, and to divers other places, on and adjacent to said rivers. And the said defendants, being such owners and proprietors of said steamboat, on the day and year aforesaid, at the city of Pittsburg, to wit, at the said county of Muskingum, in consideration that the said plaintiffs would deliver to them, the said defendants, on board said steamboat, certain goods and chattels of great value, to wit, of the value of \$4,000, to be conveyed by the said defendants, in and by said steamboat, from the said city of Pittsburg to the city of Zanesville, in the said county of Muskingum, in the like good order in which they were in when received on board thereof, the dangers of the river navigation, fire, and unavoidable accidents excepted; for a certain reward therefor, to be paid by the said plaintiffs to the said defendants, they, the said defendants, promised and undertook, to, and with the said plaintiffs, to convey the said goods

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and chattels from said city of Pittsburg to the said city of Zanesville, and there to deliver them without delay unto the said plaintiffs, or to their assigns, in the like good order in which they were received, the dangers of the river navigation, fire and unavoidable accidents excepted. And the said plaintiffs say, that although they, confiding in the said promises and undertakings of the said defendants, did then and there, to wit, on *the said 10th day of No- [364] vember, A. D. 1852, at Pittsburg aforesaid, to wit, at the said county of Muskingum, deliver to the said defendants, on board of said steamboat, said goods and chattels, to wit: 1 cask currants, 1 box liquorice, 10 boxes of tobacco, 2 cases of tobacco, and 157 bags of coffee, of the value aforesaid, to be carried and conveyed by the said defendants, in and by said steamboat, from the city of Pittsburg, aforesaid, to the said city of Zanesville, for fare and reward thereof, to be paid to the said defendants as aforesaid. Yet the said defendants, not regarding their said promises and undertakings, did not deliver the said goods and chattels in like good order in which they received them, to them, the said plaintiffs, or to their assigns, at Zanesville, to wit, at the said county of Muskingum, but wholly neglected so to do, notwithstanding they, the said defendants, were not prevented therefrom, because of any danger of the river navigation, fire, or other unavoidable accident; but, on the contrary thereof, they, the said defendants, their agents and servants in that behalf, conducted themselves so carelessly, negligently and unskillfully in the premises, that by and through the carelessness, negligence, and unskillfulness and default of themselves and their servants, and for want of due care and attention to their duty in that behalf, the said steamboat afterward, and whilst she was carrying said goods and chattels from the said city of Pittsburg to the city of Zanesville aforesaid, and before the arrival thereof at said city of Zanesville, to wit, on the day and year aforesaid, at Brunot's Island, to wit, at the said county of Muskingum, run on a snag, then and there being, and sunk in said Ohio river, whereby the said goods and chattels, whilst the said defendants so had charge thereof, to wit, on the day and year aforesaid, at Zanesville, to wit, at the county of Muskingum aforesaid, became, and were and are, wholly lost to the said plaintiffs, and are of no value whatever, to wit, at the county aforesaid, to the plaintiffs' damage of four thousand dollars; and therefore they sue, etc.

The bill of exceptions reads as follows :

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365] *Be it remembered, that upon the trial of this case, after the jury was sworn and before any evidence was offered, the counsel for the plaintiffs stated that he only claimed to recover upon the third count of the declaration, and offered in evidence the bill of lading, of which a copy is attached to this bill of exceptions, and made a part thereof, which bill of lading the counsel for the defendants admitted, and also admitted their liability as claimed by the plaintiffs, unless upon evidence thereafter to be introduced by them it should appear that they were not liable. It was also agreed by counsel on both sides that no evidence need be introduced as to the amount of the plaintiffs' damages, as in the event of the verdict being in favor of the plaintiffs, the true amount could be readily calculated and inserted in the verdict. The case then proceeded, the defendants introducing evidence tending to show that the injury to the plaintiffs' goods was caused by the steamboat upon which they were transported striking a snag in the Ohio river and sinking, and that the loss thus occasioned was to be attributed to the dangers of river navigation, one of the exceptions in a bill of lading. A question was then made before the court to this effect, namely: That, assuming that the loss was occasioned by one of the dangers of river navigation, was it incumbent upon the plaintiffs to show such neglect upon the part of defendants as would make them liable, or was it incumbent upon the defendants to show such care and diligence as would discharge them from liability: and the court then, at the request and for the convenience of the parties, decided that the burden of the proof rested upon the defendants. The defendants then further gave evidence tending to show that the said steamboat was, at and immediately before the loss, a good, staunch, strong, river-worthy vessel, having competent and skillful officers and crew, and that at the time of said loss, the pilot at the wheel was in the discharge of his duty, pursuing such a course as a prudent pilot would pursue. In the course of the introduction of this testimony the defendants examined a number of pilots, who testified that, in 366] their *opinion, the conduct of Lyons, the pilot in charge of defendants' boat, in the emergency, was correct and proper. Evidence was also given by the defendants, tending to show that, in passing down the Ohio river, near the foot of Brunot's Island, on the evening of November 11, 1852 (when and where the loss occurred), the steamboat on which the goods were placed touched the rocky bottom on the larboard side of the boat, which caused the boat to

sheer to the right, and that the pilot straightened the boat and got her in her course while running slowly, the engine being in motion; immediately after which, the steamboat "Michigan" was seen, apparently waiting at the foot of the island for the boat of defendants to pass, her furnace doors open, which had the effect of blinding the pilot of the latter boat, and causing him to go further to the right (with a view to avoid collision with the Michigan) than he otherwise would have done,—when the boat struck the snag and occasioned the loss. The defendants' witnesses were cross-examined at length by the counsel for the plaintiffs, with regard to the conduct of their pilot, Lyons, in the management of the boat at the time and preceding the accident, the head of steam under which she was running, and whether or not it was proper and prudent to run that channel under such a head of steam; but of none of them was the inquiry made, whether Lyons, the pilot, ought not to have stopped the engine and floated down until past the snag and Michigan. When the defendants' testimony was closed, the plaintiffs introduced several pilots as witnesses, who testified as to the general management of the boat at the time, and that it was, in their opinion, the duty of Lyons, the pilot, to have stopped the engine to enable him to get the boat straight after she had sheered; that to straighten the boat with the channel, having sheered, as testified to by the pilot, in a channel as narrow as that was, was extremely dangerous, if not impossible; and that it was also his duty to have stopped the engine if apprehensive of a collision with the Michigan, that if such collision should take place, no damage would have occurred therefrom.

*When the plaintiffs' testimony was closed, the defendants [367 proposed to recall witnesses they had previously examined, and also some other pilots who had not been examined, and to prove by them that, in their opinion, it was not the duty of Lyons to have stopped the engine under the circumstances above detailed. To this evidence the plaintiffs objected, and the objection was sustained by the court, and the evidence excluded, to which decision of the court the defendants excepted. When the testimony was closed on both sides, and the counsel for the plaintiffs was about to address the jury, in opening the case, the court announced that two hours only would be allowed to each side for the argument; thereupon the counsel for the plaintiffs proceeded with the opening argument for the period of one hour, and progressed so far as to speak fully

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of the testimony of the pilots in charge of the boat at the time of the accident, and then closed, stating that in his closing argument he would take up the testimony at that point. The counsel for defendants then stated that he should object to the counsel for plaintiffs saying anything to the jury in closing, which should not be in reply to defendants' argument, and should object to his introducing new points in his closing argument, not alluded to in his opening, and the court being requested by the plaintiffs' counsel, then to decide whether the request of defendants' counsel would be acceded to, did decide that such request would not be acceded to, and did afterward permit the counsel for the plaintiffs to recommence his argument at the point at which he left it, and introduce new points in his closing argument not alluded to in his opening, and to address arguments to the jury in closing the case which were not in reply to anything which had been urged by the counsel for the defendants, to which rulings and decisions of the court the defendants excepted.

In the further progress of the case, the court charged the jury that the defendants, to excuse themselves from liability for this loss, must show that it was occasioned by one of the excepted **368]** *perils, mentioned in the bill of lading, to wit: "Dangers of river navigation, fire, or unavoidable accidents," and that having shown that the burden then rests upon the defendants to show that the degree of care, which the law requires of them, was exercised, and that proof by defendants, that the loss was attributable to the danger of river navigation, did not throw upon the plaintiffs the burden of proving that such loss might have been avoided by the exercise of the proper degree of skill. The court then proceeded to state to the jury the three different degrees of neglect for which bailees were liable—corresponding to the three different degrees of care and diligence required of them, and that the defendants were bound to exercise the highest of these three degrees of care, and responsible for the slightest of these three degrees of negligence. To which opinion of the court, the defendants, by their counsel, excepted.

After the rendition of the verdict, which, by consent, was filled up with the admitted amount of the loss, the defendants moved the court for a new trial, for reasons on file, one of which is based upon an affidavit also on file, which motion was overruled by the court. And to this decision of the court, and all the other rulings afore-

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said, defendants, by their counsel, excepted, and pray the court to sign and seal this, their bill of exceptions, and that it be made a part of the record, which is now here accordingly done.

The part of the bill of lading material to this report is as follows:

"Shipped in good order, and well conditioned, by D. Leech & Co., for account and risk of whom it may concern, on board the good steamboat called the Dan Convers, whereof is master for the present voyage, Galigher, now lying at the port of Pittsburg, the following articles, marked or numbered as below, which are to be delivered without delay, in like good order, at the port of Zanesville (the dangers of river navigation, fire, and unavoidable accidents excepted), unto W. H. Davis & Co., or to his or their assigns; he or they paying freight for the said goods, at the rate of as per [369 agreement, per one hundred pounds, and charges, \$150.73.

"In witness whereof, the owner, master, or clerk of said boat hath affirmed to two bills of lading, of this tenor and date; one of which being accomplished, the other to stand void.

"Dated at Pittsburg, this 10th day of November, 1854."

MARKS.		
W. H. D. & Co.,	1 cask Currants.....	283
Zanesville, O.	1 box Liguorice.....	246
CHARGES.	10 boxes Tobacco, 128, 126, 126, 134, 124, 132,	
529 a 60.....	136, 136, 124,	136
\$ 3 17	2 cases Tobacco.....	300, 293
1,895 ".....	157 bags Coffee.....	25,825
11 37		
25,825 a 50.....		28,249
129 13		
Dray.....		7 06
		\$150 73

C. B. Goddard and *E. B. Eastman*, for plaintiffs in error:

I. The ruling of the district court, that upon the then defendants rested the burden of proof, not only that the loss was occasioned by one of the excepted perils, but also that the loss could not have been avoided by the exercise of the highest degree of skill, is complained of as too strict an administration of the law in this case. This actin is founded upon special contract—it is not charged that the defendants were common carriers, though if it were, we do not see that it ought to make any just distinction. Proof of non-delivery might require defendants to account for them. But do they not account for them when they prove that the goods were lost by

the dangers of the river navigation? A loss proved to have happened in consequence of an unavoidable accident, is not the subject of any other or further proof. The highest degree of care could not have guarded against it, and there need be no dispute as to the *onus probandi* in such a case. A loss by fire, or by the dangers of river navigation, presents a different question. The defendants may be liable for a loss by the dangers of the river, and they may be 370] liable for a loss by fire, *because either may be the result of such carelessness as would go to charge them. But the question in this case is, whether, when defendants have shown that the loss was occasioned by one of these excepted perils, the court will superadd a presumption that it was occasioned by such neglect as to make them liable.

We can comprehend why a court should say, with reference to such a contract as this, that it would be sufficient for the plaintiff to prove the non-delivery of the goods to give him a *prima facie* claim to recover, but it is not easy to understand that this *prima facie* claim should continue after the defendant had shown a loss by one of the very perils excepted in his bill of lading. What we claim is this: that the burden of proof is not a constant, ever-flowing principle, adhering throughout to the side of the case to which it first attached, but that it varies with the shifting circumstances of the case, and may be sometimes on one side and sometimes on another. This principle is sanctioned by the high authority of the Supreme Court of the United States, in *Clark v. Barnwell*, 12 How. 272.

What is said upon this subject by the learned judge who delivered the opinion of this court, in *Davidson v. Graham*, 2 Ohio St. 141, is *obiter*; but of the principle he enunciates in summing up, no complaint is here made. When the case goes to the jury upon this principle, and the *prima facie* case is admitted, and the loss is shown to have been produced by a cause falling within the exceptions, we do complain if there is then superadded the burden of showing that this excepted point could not have been avoided but by the highest degree of skill and care.

The case of *Whiteside v. Russell*, 8 S. & W. 44, is relied upon to sustain this extreme rigor. The bill of lading in that case contained the same exception which is found in this, and the loss arose from striking a stone in the Ohio river. Judge Rogers (p. 49) says: "It is not unreasonable to require the carrier to prove the loss and

manner of it; and, further, that the *usual care and diligence* had been used to avoid it."

*We are held to proof of a very different kind of diligence. [371] The court held us to the highest degree of care, and threw upon us the burden of proving that we had exerted it. It made us responsible for the slightest neglect, and required us to prove we were not guilty of it.

II. We have little to say upon the other points excepted to. The court can not read the bill of exceptions without perceiving how we were surprised by the evidence lastly introduced by the plaintiffs. We admitted their case, and set to work to prove how the loss arose, and how we conducted at the time. Not a breath is whispered, until we have closed our evidence, as to its being the duty of the pilot to have stopped the boat, and then the plaintiffs spring upon us this new point, and we are not permitted to introduce evidence to overthrow it. To cap the climax, the plaintiffs have the opening and close, though we have the burden of proof, and Mr. Jewett opens just so far as to come to the spring-gun of his case and stops, and is permitted in his reply to take up his argument as he had his evidence, and urges a recovery upon a point to which we had no opportunity of reply.

Jewett & O'Neil, for defendants in error:

I. It is not alleged in the declaration, in so many words, that the defendants below were common carriers; and such naked allegation would have been demurrable. But we do allege everything necessary and requisite in charging them as common carriers, and that, too, in the very language of the most approved forms; and it was so treated on the trial, as evidenced by the admissions of the plaintiffs in error. 2 Chit. 356, 364, and notes; *Ib.* 664, and notes; *Swan's Prec.* vol. 1, 259, note.

II. The degree of care required of the plaintiffs in error was the same required of common carriers in all cases. And the ruling of the district court as to the burden of proof was not erroneous. It was on account of the hazardous uncertainty of *that class [372] of witnesses—the men by whose negligence, unskillfulness, or recklessness the loss was occasioned—that many of the most enlightened courts of this country have refused to entertain the doctrine that a common carrier could, by special contract, limit his liability. 19

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Wend. 234, 251; 1 Hill, 623; 2 Ib. 723; 10 N. H. 487; 10 Met. 479; 2 Kel. 349.

The case of *Davidson v. Graham*, 2 Ohio St. 132, settles, in Ohio, the principles upon which the liability of common carriers rests, and the rules of evidence by which it is to be ascertained. We can not for a moment suppose that this court will review an opinion delivered after such mature consideration, in a matter of such vital importance, and so fully sustained by authority. 2 Greenl. Ev., sec. 219; Ang. and Am. Law of Car., secs. 168, 202; Story on Bailm., sec. 509, 529; 8 Watts & Serg. 44.

In *Clark v. Barnwell*, 12 Howard, the question was not considered in the court below, nor was it supposed, necessarily, to arise. It was not presented in the brief of the counsel for the appellants, who considered the case as it was presented and disposed of in the court below. The counsel for the appellees merely stated the proposition, without citing the authorities in its support or illustrating it by argument. The court evidently treated it as an incidental question, without giving to it that consideration which its importance deserved. The case referred to in support of the opinion of the judge (*Muddle v. Strider*, 9 Car. & Payne, 380) should not be considered as settling any question, more particularly one so important as this, it being but the opinion of a single judge, expressed incidentally, in the hurry of a trial, to the jury, without consideration, and in the absence of argument; and the opinion is a divided one, Taney, C. J., and Wayne, J., dissenting.

If the position of our Supreme Court, in *Davidson v. Graham*, be maintained, we will be saved much of the confusion and many of the calamities that followed the first innovations on the law, as originally established for the government of common carriers. *But change the doctrine—shift the burthen of proof from the carrier to the owner—and this court, with all others in our country, will have occasion to indulge in the same regrets to which the judges of the courts of England were so frequently constrained to give utterance, on witnessing the consequences which flowed from such innovations. 1 Starkie, 72; 3 B. & Bing. 177; 5 East. 507.

(The other points of counsel relate to the matters referred to in No. II, of the argument of counsel for plaintiff in error. It is not thought necessary to extend this report by inserting them at length: counsel for defendants in error maintaining that the matters complained of were within the discretion of the court, trying

the cause, and that that discretion was rightly exercised, but that at all events it can not be reviewed on error.)

RANNEY, J. That the plaintiffs in error were common carriers, and as such undertook to transport the goods of the defendants from Pittsburg to Zanesville, and that they were never delivered at the port of destination, are facts, not only sufficiently averred in the declaration, but were substantially admitted upon the trial. The bill of lading certified, that the goods were received in good order, on board the steamboat Dan Convers, and bound the carriers to deliver them without delay, in like good order, "the dangers of river navigation, fire, and unavoidable accidents excepted." The declaration averred, that they were not prevented from making the delivery by any of the excepted perils; but that the goods were lost by the careless navigation of the boat, by which she was snagged and sunk, at the foot of Brunot's island, in the Ohio river. Upon this averment the parties were at issue—the plaintiffs in error claiming that the loss was occasioned by one of the excepted dangers of the navigation; and they now insist that the court below erred in casting upon them the burden of proving that the accident happened without their fault, while the boat was being navigated with the highest degree of care; and in rejecting certain evidence offered by them.

*1. The question presented upon the first point, arises [374 upon the charge, in which the jury were instructed, that it was incumbent upon the carriers, not only to show that the loss was occasioned by one of the excepted perils mentioned in the bill of lading, but that the proper degree of care was exercised to prevent the loss; and after stating the three degrees of care required of bailees, under different circumstances, that the carriers were bound to the exercise of the highest of these degrees of care, and responsible for the slightest of the three corresponding degrees of negligence. Counsel for the plaintiffs in error admit, that it was incumbent upon them to have shown that the goods were lost by one of the excepted perils; but they insist that the burden of proof was then shifted upon the owners, and that they were bound to prove negligence before the carriers could be charged. We think this dividing a thing in its nature indivisible. Either the loss was occasioned by a peril of the navigation, or by the negligence of those in charge of the boat. It must have been the one or the other,

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and could not have been both. If proper care could have avoided it, it was not a peril incident to the navigation; if such care could not, it was. From the very nature of the undertaking, without care, the loss was inevitable; and with care, it might be unavoidable. From the failure to deliver the goods, the law raised the presumption of negligence against the carriers—*prima facie*, the fault was theirs—and this presumption could only be rebutted by showing that they were without fault. As positive care was indispensable to the safety of the goods, they could meet and overthrow the legal presumption of negligence, in no other way than by showing that such care was exercised. Proof that the boat was snagged, fell short of proving that it was not snagged by the fault of those in charge of it; and, consequently, short of overcoming the *prima facie* case of the plaintiffs below. To do this it was not enough to have shown, that the loss was occasioned by what might, or might not, have been a danger of the navigation: 375] nothing short of proof that it was the *one, and not the other, could have been sufficient; as nothing short of that could bring the case within the exception provided for in the contract.

The defense rested wholly upon this exception. No attempt was made to bring the case within either of the common-law exceptions to the carrier's liability.

In the case of *Davidson v. Graham*, 2 Ohio St. 131, it was settled by this court, that the carrier might, in this manner, limit his common-law liability. But in adopting so important a principle, the court very carefully considered all its bearings; and endeavored to incorporate it into the law of this state, with such qualifications and restrictions, as seemed to be necessary to make it safe and practicable.

Very strong arguments (thought to be unanswerable by several eminent judges in our sister states) were advanced against any relaxation of the common-law responsibility. It was said, that the highest considerations of public policy required the carrier to become an insurer of the goods intrusted to him, against everything but the act of God, or the public enemies. That he took upon himself a public employment; and ought not to be permitted to discharge himself from the responsibilities, which the trying test of time and experience had demonstrated to be necessary for the safety of the public. That since the introduction of steamboats and railroads, he had, practically, taken exclusive possession of the public

thoroughfares of the country; and was thus enabled to impose his own terms upon the owners of goods, who had no choice but to employ him. That the owner seldom accompanied his property, and in case of loss or injury, however gross the negligence might have been, was wholly unable to prove it, without relying upon the servants of the carrier, who would always be found too ready to exculpate themselves, and their employer.

That these considerations were entitled to much weight, can not be doubted; and they were not, to any extent, lost sight of in determining that the parties might by their agreement, to a [376] certain extent, restrict the liability of the carrier. He is still regarded as exercising a public employment, and incapable, by any act of his own, of limiting or evading the responsibility which the law attaches to its exercise.

The first attempt to do so, by general notices brought home to the owner of the goods, was, for a considerable time, sustained by the English courts—with the frequent expression of regret, however, by distinguished judges, that it had ever been so held—until, at length, the evil was remedied by an act of Parliament. The courts of this country very generally repudiated the doctrine, and escaped the regrets of the English courts. *Hollister v. Nowlan*, 19 Wend. 235; *Cole v. Goodwin*, Ib. 251; *Wells v. The Steam Nav. Co.*, 2 Com. 204; *New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. U. S. 344; *Jones v. Voorhees*, 10 Ohio, 145.

The *implied* assent of the owner of the goods to the terms prescribed by the carrier, upon which the English cases are founded, it is very conclusively shown in the American cases, can not be fairly assumed; since the carrier is bound to receive and transport all goods offered for the purpose, subject to all the responsibilities incident to his employment; and the owner may be quite as fairly presumed to have intended to insist upon the rights he undeniably had, as to have assented to a qualification which the carrier had no right to impose.

But a very different question was presented, when cases arose in which the owner had *expressly* assented to such qualification, and made it a part of the contract of transportation.

In such cases, the very obvious conclusion was reached that such a stipulation was valid when it only affected the rights and interests of the owner of the goods. So much of the responsibility of the carrier as was designed alone for his security, might at his pleasure

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be renounced, in accordance with the settled maxim of the law—*Quilibet potest renunciare juri pro se introducto.*

377] *The limit to this power was equally obvious. The common-law exception to the carrier's liability of losses arising from the act of God, was well settled, to include only those inevitable causes of loss into which no human agency could have entered. This left the carrier liable as an *insurer* for many losses, equally inevitable, and which no care or prudence on his part could have prevented. No one but the owner of the goods could have any interest in this liability, and as its renunciation had no tendency to relax the vigilance which the carrier owed to others, the owner was at liberty to surrender it. But he had no power to stipulate for what was immoral in its tendency, or to take from the carrier any of the motives to the faithful discharge of his public duty, and consequently could not relieve him from the consequences of his own negligence or carelessness.

There is nothing in which the public have a deeper interest than the careful and prudent management of public conveyances, and no higher moral obligation than rests upon those intrusted with the control of dangerous forces, to discharge their duties with care and skill. Upon it the safety of thousands of lives and millions of property daily depends.

Now, one of the strongest motives for the faithful performance of these duties, is found in the pecuniary responsibility which the carrier incurs for the failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract, therefore, with one to relieve him from any part of this responsibility, reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral, because it diminishes the motives for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have.

Nor did the establishment of the principle that the carrier might, by contract, restrict his common-law liability, in any manner, or to 378] any extent, change the rules of evidence before *applicable to the subject. Before, the law *prima facie* imposed upon him the obligation of safety, and he was charged upon proof of the non-delivery of the goods. The burden of proof was upon him to bring the case within one of the excepted perils. Ang. on Carriers, sec. 202; Story on Bailm., sec. 529. And it was not brought within the

exception, until it was shown that care and skill could not have prevented the loss. 2 Greenl. Ev., sec. 219. We know not where this rule of evidence has been doubted, except in a divided opinion of the Supreme Court of the United States, in the case of *Clark v. Barnwell*, 12 How. 272. The learned judge who delivered the opinion of the majority was able to bring to his support only the single *nisi prius* case of *Muddle v. Strider*, 9 Carr. and Payne, 380, in which Lord Denman instructed the jury that, in passing upon all the evidence before them, they must be able to see clearly that the carriers were guilty of negligence, before a verdict was found against them.

Judge Nelson very properly admits, that it was incumbent upon the carriers to have shown a loss from some one of the causes which, by the general rules of law, or the particular stipulations of the parties, would have furnished an excuse for the non-performance of the contract; and that if reasonable skill and attention could have avoided it, "it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty." But he fails to show how, in the nature of things, where constant care was indispensable, the loss could be shown to have been inevitable, without giving *prima facie* proof that such care was exercised; or what reason, founded in public policy or intrinsic justice, could be given for relieving the carrier, within whose knowledge the facts so peculiarly lay, and by whose agents they could be so easily established, from the necessity of making such proof, and casting the burden of proving the contrary upon the owner of the goods, in most cases ignorant of the facts, and without the means of making them appear.

*On the whole, we think Mr. Greenleaf fully justified upon [379 principle, and the decided weight of authority, in saying that, "in all cases of loss by a *common carrier*, the burden of proof is on him to show that the loss was occasioned by the act of God, or by public enemies. And if the acceptance of the goods was *special*, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, *but also that there was, on his part, no negligence or want of due care.*" 2 Greenl. Ev., sec. 219.

We have alluded, somewhat at length, to the effect of the decision in *Davidson v. Graham*, not because all the questions now discussed

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were not fully considered by the court and explicitly stated, but because some of them were not so directly involved as in the present case, and from a desire to be as explicit as possible upon a subject so highly important to a state whose surplus productions must all find a market through the intervention of common carriers.

The whole may be summed up in this: the carrier, by agreement with the owner, may exonerate himself from responsibility for losses arising from causes over which he has no control, and to which his own fault or negligence has in no way contributed. But in doing so he does not cease to be a *common carrier*, nor in any manner change his relation to the public as such; and he can only excuse himself for a failure to deliver the goods intrusted to him, by showing that, without his fault, he has been prevented by some one of the causes recognized by law, or specifically provided for in the contract.

This case requires very little to be added as to the degree of care exacted of the common carrier. We have already said that he is not at liberty to stipulate for any degree of negligence, and that a loss from negligence can not be within the stipulated exceptions to his liability. Indeed, in the carriage of passengers, and perhaps of goods, by steam, it might not be difficult to place it upon much higher grounds, and to fully justify the remarks of *Mr. Justice Grier, in delivering the opinion of the court in the case of Philadelphia and Reading Railroad Company v. Derby, 14 How. 468. He says: "Where carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

But it is only necessary now to say, that if the loss was occasioned by negligence, whether slight or gross, it was not within what was, or could have been made by contract, an exception to the carrier's liability.

We are therefore unanimous in the opinion that the district court was right in holding that the burden of proof was upon the carriers to show that there was no negligence or want of care, and that, if the loss was the result of any negligence on their part, it was not within any exception provided for in the contract.

2. The court are not unanimous upon the second question presented. A majority, however, concur in holding that no error was committed. From the bill of exceptions it appears that the principal controversy in the case related to the conduct of the pilot at the wheel, at the time the accident happened. The defendants below gave evidence to show the situation of the boat, the surrounding circumstances, what the conduct of the pilot was, and the head of steam under which he was running; and then called several experienced pilots, who expressed the opinion that the conduct of the pilot in charge of the boat was correct and proper. The plaintiffs then introduced several pilots, who expressed a different opinion, and thought the pilot in charge should have stopped the engine. The defendants then proposed to recall their witnesses, and also some other pilots who had not been examined, and to prove by them that, in their opinion, it was not *the duty of the pilot to have stopped [381 the engine. This evidence being objected to, was ruled out.

It will be observed, that all these witnesses were giving opinions upon exactly the same circumstances. No attempt was made to change or vary them in the least. Under the circumstances, the defendants' witnesses were of opinion that the pilot was right in keeping on steam, and doing just as he did do. With a view to the same circumstances, the plaintiffs' witnesses were of a different opinion, and thought he should have shut the steam off. Now, what could have been accomplished by recalling the defendants' witnesses, other than a repetition of the opinion previously expressed, we are quite unable to see. It is true, they might have said, expressly, that the pilot should not have stopped the engine (a question they had not before been asked), but, in the end, it would amount to nothing more than an opinion, that he should have done as he did, and not differently. There can be no dispute as to the general rule of evidence. The party upon whom the affirmation of an issue devolves, is bound to give all his evidence in support of the issue, in the first instance; and he can only give such evidence, in reply, as tends to answer the new matter introduced by his adversary. In this case no new matter was introduced. The opinions of the defendants' witnesses were simply encountered by those of the plaintiffs'. But while this is the rule, and generally to be adhered to, I am very far from saying that, in the exercise of a sound discretion, it is never to be relaxed. Indeed, very few cases can arise in which

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a court would be justified in closing the case, until all the evidence offered in good faith, and necessary to the ends of justice, has been heard. And it is very probable, in this case, that a fuller examination should have been allowed. But this must always be an appeal to the sound discretion of the court, to be determined with a view to all the circumstances, and however determined, is not reviewable on error. It is our duty to see that the rules of law are not infringed, but we can not revise the mere discretion of an inferior tribunal.

382] *J. R. SWAN, J. I concur in the opinion, that the burden of proof was upon the carriers to show that there was no negligence; and that, if the loss was the result of any negligence, it was within any exception provided in the contract.

But in thus holding and requiring proof by the carrier of the cause of the loss and of care, the course of proof in the case must, necessarily, be thus: the plaintiff first proves the delivery of the goods to the carrier, and that they were not received by the plaintiff. This entitles the plaintiff to recover. The carrier must then prove that the loss arose from one of the exceptions provided for by the contract, and that the servants of the carrier were in the due exercise of care. This proof made out *prima facie*, would entitle the carrier to a verdict. The plaintiff then may prove any fact or omission of duty establishing negligence. If this fact be a specific one, upon which the witnesses of the carrier were not examined, such, for instance, as that the engine should have been stopped, it is, I conceive, the right of the defendant to rebut such testimony; for the specific fact, and omission of care, upon which the action is founded, is then for the first time disclosed and proved by the plaintiff. According to my view of the case, under the rule adopted by the majority of the court and applied in this case, the carrier is first required to make out a *prima facie* case of care, and then, when the plaintiff proves his cause of action, the defendant is precluded from giving evidence in his defense; for how can he anticipate what act of negligence will be proved against him? Surely, he is not to come prepared with witnesses to rebut every *possible* claim of neglect that may be alleged. This would require witnesses to be produced at perhaps great cost, and consume the time of the court, in rebutting claims never intended to be made by the plaintiff.

The present action was brought to recover damages on account of loss of goods arising from the servant of the carrier not stopping his engine, under circumstances which due care demanded. The

ground of the action was not disclosed by the pleadings or *the [383 proof, or by any reference to it in the examination of witnesses, until the plaintiff gave in his rebutting testimony. I think the judgment should be reversed.

THURMAN, C. J., concurred with Judge Swan.

THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTAMENT OF HENRY HATHAWAY, DECEASED.

On the proceeding authorized for admitting a will to probate, persons interested to resist the probate of the will, are not allowed to introduce evidence to contest its validity.

CERTIORARI, to the court of common pleas of Hamilton county.

In November, 1852, Jane Hathaway and others presented to the probate court of Hamilton county, a paper purporting to be the last will and testament of Henry Hathaway, deceased, accompanied by a petition that the same be in due form admitted to probate and record; whereupon Elisha Hathaway and others, claiming to be heirs at law of said Henry Hathaway, deceased, appeared in said court, to resist the admission of said alleged will to probate, and filed a written statement of the grounds of such resistance. The probate court having examined the witnesses to the will, allowed those who resisted its probate to cause witnesses to be called and examined, impeaching the validity of the instrument as the last will and testament of the decedent. And on consideration of the evidence, and having heard the arguments of counsel for the respective parties, the court found that the paper propounded for probate, as and for the last will and testament of Henry Hathaway, deceased, was not truly and *duly executed by him; and that, at [384 the time of the signing of the same, the said Henry Hathaway was under restraint. Whereupon it was ordered, that the application to admit said will to probate was refused and overruled. From this decision an appeal was taken to the court of common pleas, where, on the hearing of the case, the evidence offered by those resisting the probate of the will, was rejected, and the will duly admitted to probate

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and record. And to reverse this proceeding in the common pleas, the writ now under consideration is prosecuted. The ground of error assigned is that the common pleas refused to receive the evidence offered by those resisting the probate of the will, and interested against it.

Walker, Gwynne & Gholson, for the applicants.

Chase & Ball, for the resistants.

BARTLEY, J. The single question presented for determination in this case is, whether upon an application for the probate of a will, evidence be admissible on behalf of those who resist its admission to probate and contest its validity. And this depends on the construction to be given to section 12 of the statute relating to wills, passed May 3, 1852, which is in the following words:

"The said court shall cause the witnesses to such will, and *such other witnesses as any person interested in having the same admitted to probate* may desire, to come before such court; and said witnesses shall be examined in open court, and their testimony reduced to writing and filed."

It is claimed on behalf of the plaintiff in error, that the admission of a will to probate is a judicial act; that where evidence is received as the basis of judicial action, it must be received on both sides, and that the language of the above statutory provision, in regard to the witnesses other than the witnesses to the will, when interpreted according to the reasonable intent of the law, 385] *must be taken as meaning *such other witnesses as any person interested in the subject-matter of the probate of the will may desire*, etc.

It is a maxim of interpretation, that, in the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument. The language of a statute must be taken in its usual and ordinary signification, and a court is not allowed to make an interpretation contrary to the plain and express letter of the law. Where the sense of a statute is evident, and expressed in clear and precise terms, not leading to conclusions which are absurd and at war with the manifest intention of the law, to go off upon conjecture, and travel in quest of extraneous matters, in order to restrict or enlarge its operation, would be a dangerous and gross perversion of the law itself.

The language of the statutory provision above recited, is plain

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and explicit. The witnesses whose examination is authorized on probate of a will, are the witnesses to the will, and "*such other witnesses as any person interested in having the same admitted to probate, may desire.*" The meaning would not have been expressed with greater perspicuity, had the phraseology been, *and such other witnesses as any person interested in favor of the admission of the will to probate, may desire.*

An application to admit a will to probate is not an adversary proceeding. Those who may be interested adversely, are not required to be notified, or summoned to be present; and no issue is made for a contest between adverse parties. This is not the proceeding in which those who deny the validity of a will are authorized to contest it. After a will shall have been admitted to probate, those who have adverse interests, have the right to contest its validity, by petition in the court of common pleas. In that proceeding, an issue is required to be made, which is regularly tried before a jury. And this proceeding to contest a will can not be instituted until after the will has been admitted to probate. If those who deny the validity of a will had the right to send for witnesses, and [368] contest it on the application to admit it to probate, the statute would run into the absurdity of allowing a party two distinct courts, and two distinct modes of contesting and having an adjudication of the same fact; and the adjudication of the first tribunal, although not appealed from, no bar to the second proceeding. Before probate, a will is without any legal effect, and can not even be made the subject of a proceeding to contest it. The form and solemnity of the proceeding to admit a will to probate, is required to show its due execution, and admit it to become a matter of public record. The evidence required, must show a *prima facie* case in favor of its validity, and that evidence is required to be reduced to writing, and made a part of the record. It would be preposterous to place upon the record of the probate of a will, evidence introduced to impeach its validity.

It is true, that the statute enacted in 1840, relating to wills, permitted any person interested, whether for or against the will, to introduce evidence on the proceeding to admit to probate. But in the enactment of 1852, care seems to have been taken, by the use of words explicit and precise, to exclude the absurdity of permitting those who deny the validity of a will, to appear and contest it on the proceeding in the probate court, to admit the will to record.

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And the provisions of sections 47, 48, and 49, of the act, which relate to the lost, spoliated, and destroyed wills, where notice to those interested to resist the probate is required to be given, special care was taken in wording the statute, to preserve the harmony and consistency of the proceeding, by authorizing only those "*interested in having the will admitted to probate,*" to introduce witnesses for examination.

The court of common pleas therefore ruled correctly in excluding the evidence offered by those who were interested in resisting the probate of the will.

The judgment of the common pleas affirmed.

387] *WM. H. PEABODY AND EMERY D. POTTER v. OHIO, FOR USE OF HYDORN.

The sureties in the official bond of a justice of the peace, conditioned that the officer should well and truly pay over, according to law, all moneys that might come into his hands, by virtue of his commission, are liable, upon failure of the personal representative of the officer, after his death, to pay over, upon demand, moneys that came into his hands officially during his term of office.

ERROR to the district court of Lucas county.

This suit was originally brought upon the official bond of a justice of the peace. The questions presented arise upon demurrer to the plea.

The declaration sets forth the recovery of a judgment, by confession, before David Burger, a justice of the peace, in favor of Hydorn, against one Bronson; the payment of the amount of the judgment to the justice by Bronson, on the 11th of October; the death of the justice on the 1st of November; the making of a will by the justice, appointing Catharine Burger the executrix thereof; the probate of the will and qualification of the executrix, on the 27th of November; the demand of the money from the executrix, on the 7th of April; and her refusal to make payment.

To this declaration the defendants plead, in substance, that on the day of the payment of the money upon said judgment, by said

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Bronson, to said justice, he, the said justice, deposited the same money, so paid to him, in the Commercial Bank of Toledo, for the purpose of keeping the same safely, and whenever the same should be thereafter called for by said Hydorn (who was a resident of Michigan), to pay the same over to him, and that said moneys so remained deposited and kept for him, the said Hydorn, up to the time of the decease of said justice; that no part of said moneys were demanded of said Burger, in his lifetime, and that since his *death, the money has been received by the executrix, who [388 has failed to pay the same over to said Hydorn, on demand.

To this special plea the plaintiff demurred. The district court sustained the demurrer, and gave judgment for the plaintiff.

The errors assigned are, in substance, that the court erred in sustaining the demurrer.

Bassett & Kent, for plaintiffs in error.

The question presented is, can the sureties of Burger be held responsible for the neglect or wrongful acts of his executrix?

The case, as presented, shows that there was no act of *official misconduct* on the part of Burger, and unless his bail are liable, *at all events* for the payment of this money to Hydorn, the action can not be maintained.

The contract of a *surety* is to be construed *strictly*, and is not to be extended beyond the fair scope of its terms. *Miller v. Stewart et al.*, 9 Wheat. 680; 3 Pet. Dig. 343; *Farrar and Brown v. The United States*, 5 Pet. 372.

The last case cited was, where the money was received by the officer before the date of the execution of the bond; and after the same was appropriated, and not paid over, on page 388, the court say, "if intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct." *A fortiori*, have they not undertaken against the misconduct of his executrix, after his death. See *Thompson v. Young et al.*, 2 Ham. 334.

In the case of *The State v. Alden's sureties*, 12 Ohio, 59, the court laid down a more stringent rule than any other we find in regard to sureties, although the case was such that the sureties were correctly held liable; but even this rule, applied to this case, would not render the sureties liable, the court say, "as long as the obligation to pay continues an *official duty*. The officer must at all

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times, and to every intent, perform his whole duty. The undertaking of the surety is, that there shall be no such thing as *official misconduct*."

389] *What act of official misconduct was there in this case? The officer had at all times, and to every intent, performed his whole duty, by keeping the same money ready for the person entitled to it, up to the time of his death.

M. R. Waite, for defendant in error:

From the plea, it appears that the money was deposited in bank to the credit of the justice. It was subject to his order and that of his legal representative. It was a general, not a special deposit. Hydorn could not have demanded it from the bank. If the bank had failed, the loss would have fallen upon the justice. He had no authority from Hydorn to make the deposit.

By the deposit, then, in his own name, the justice converted the money to his own use, and his liability was changed from that of a mere trustee to that of a debtor. He was in the same position he would have been had he loaned the money to a third person and taken a note for it. The deposit may have been intended as a fund from which to make the payment whenever demand was made. This intent is not, however, evidenced by anything in the transaction. It does not appear from the plea that the bank was notified of the object of the deposit. Neither does it appear from the plea that the executrix had any knowledge of such intent. On the death of the justice, this money was found to his credit in bank. The executrix alone had power to withdraw it, and she did so.

Again, it does not appear from the plea but that the justice might have had other moneys on deposit at the same time, and that this amount went to his general account. The declaration alleges the payment of the debt and costs. The plea avers that all the money paid was deposited. If so, then part of the deposit did belong to the justice, and over that the executrix had full control.

Had the justice kept the money in his own possession, distinct
390] *from his other moneys, and so marked as to identify it as the property of Hydorn, then he might have been treated as a mere trustee, and his ability governed accordingly. By his deposit he has, however, made the bank his creditor and himself the debtor of Hydorn. The amount due from the bank went into his general assets, and the executrix, if the estate was insolvent, could not ap-

appropriate this deposit to the payment of Hydorn's claim, to the exclusion of other creditors. But the solvency or insolvency of the estate does not affect her power over the money. Finding it to the general credit of her husband, in bank, with nothing to indicate that it was the property of another, she had the right to withdraw it and treat it as her own.

A justice, to save himself from personal responsibility, beyond that of a mere trustee, must keep the funds received by him in his official capacity separate and distinct from his own, and, to prevent their falling into his general assets on his decease, they must be so marked and identified as to show that they are the property of the person for whose use he holds them. Something must be done which shall notify his personal representative of the nature of his property therein.

In this case, nothing of this kind is pretended. The plea avers no such notice to the executrix, and the whole proceeding shows a conversion to his own use before his death. It is not, in other words, a conversion by the executrix, but by the justice in his lifetime.

The demand upon the executrix is sufficient to charge the sureties. She was the legal representative of the justice, and the only proper person to call upon for the discharge of his liabilities. One of these liabilities was the payment of this money to Hydorn on demand.

Again, it does not appear from the plea but that the executrix still holds the money, and the bail may, for anything which now appears, call upon the executrix and receive the money from her, if they are condemned in this action. The averment in the *plea is "that the executrix has received the money from the [391 bank since the death of the justice, and has failed to pay the same over on demand."

As we have seen, she was the only person who could draw the money from the bank. There was nothing improper then in her obtaining it. She was the proper person to take the fund upon the death of the justice. She has done so. It has been demanded of her and she fails to pay it over.

A demand can not be made of the justice, and unless it may be from the executrix none can be made. If none can be made, then suit may be instituted on the bond without demand. If the aver-

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ment of demand from this executrix was unnecessary, it will be rejected as surplusage.

The facts then, as they appear upon the pleadings, do not even make out a case of a wrongful act on the part of the executrix, and we need not consider the question how far the bail would be liable if such had been the case.

To lay the foundation for such a defense, it should at least appear, that the funds had been kept in such a position during the life of the justice, that Hydorn could, upon his decease, take them from the executrix by writ of replevin. If this was not the case, there had been a conversion to the justice, and the non-payment by the executrix was in consequence of his official misconduct.

But suppose this had been the case of a wrongful act upon the part of the executrix, would not the bail of the justice still be liable? Is it not within the true intent and meaning of the undertaking of the sureties, that the justice, and those who succeed to his obligations on his decease, shall discharge those obligations? The object of the bond was to secure to parties entitled thereto, prompt payment of all money which should come into the hands of the justice, in his official capacity. This the sureties understood. The law, upon the decease of the justice, transfers to his legal representatives, all funds [392] remaining in his *hands uncalled for at the time of his death, and also imposes upon the legal representative, the duty of making payment on demand. This also the sureties understand. In effect, the legal existence of the justice is continued after his decease in his executor or administrator, until full payment is made of all moneys remaining in his hands at the time of his decease, and the undertaking on the part of the sureties is, that the justice and those who succeed to his obligations on his death, shall pay over on demand all moneys which may come into his hands in his official capacity during his life. But as I before said, a consideration of the question is not necessarily involved here, for the reason that the pleadings do not show affirmatively a wrongful act on the part of the executrix, but on the contrary, official misconduct of the justice in the conversion of the funds during his lifetime.

RANNEY, J. In this case, the judgment of the district court must be affirmed. We are by no means satisfied that the justice had so dealt with, or treated the money in his hands, as to make it his own, or that he was guilty of any official misconduct that would have

worked a breach of the bond. He held the money in trust for the creditor, and was bound to keep it safely; but this did not preclude him from placing it in a safe place of deposit, where it was kept safely. Had he no right to mingle the money with his own; but the averments of the plea do not warrant the conclusion that he did so; or that he did more than place the identical money he received, on special deposit, to be safely kept until called for by the creditor. We assume, therefore, that there was no breach of the official bond during the life of the justice. But does the obligation of the sureties, to see that money received by him in his official capacity is properly paid over, cease with his life, or other termination of his official term? We think not.

Such a conclusion is neither warranted by the terms of the bond nor the object for which it is taken, while it would destroy all security for paying over a considerable portion of the [393] money that must, necessarily, come to his hands. It would not stop with exonerating from liability the sureties of justices of the peace, but would extend equally to those of sheriffs, treasurers, constables, and a multitude of other public officers, who receive large sums of money which must, necessarily, remain in their hands at the termination of their official terms. The money received in this instance by the justice was held in trust for the creditor, and the only way in which the former could discharge himself from the trust was by paying it over, upon demand, to the latter. To secure fidelity in the performance of this duty, the official bond was taken. The sureties undertook that he should "well and truly pay over, according to law, all moneys that might come into his hands by virtue of his commission." Until demanded, he was required to keep it safely; and when demanded, whether he was then in or out of office, to pay it over to the person entitled. This his sureties bound themselves he should do, and a failure to do it is a breach of their bond. When they assumed the obligation, they must be presumed to have known that, in the regular exercise of the duties of his office, it would probably terminate with money in his hands, and to have contemplated the various contingencies by which it might be brought to a close before the regular period for which he was elected. One of these was death; and in such a case they knew very well that the obligations resting upon him in respect to such funds, were by law cast upon his personal representative. They came to the hands

of the latter not, as a part of the estate, or to be administered as such, but for safe-keeping, and to be paid over to the person entitled to receive them. These things being within the contemplation of the contract, are, upon the best settled principles, within its obligation and legal effect. The sureties, therefore, upon the very contingency that here happened, bound themselves, not only for the fidelity of the justice, but, in the event of his death, for that of his personal representative, into whose custody the law committed 394] *the fund and charged with the duty of safe-keeping and disbursement. By the very terms of the bond, it is enough that the officer should have received the money "by virtue of his commission;" and in respect to all such moneys, the sureties undertake that he shall well and truly pay it over according to law. It is not paid over according to law, whether he be in or out of office, or whether the obligation still rests upon him or has been transferred to his personal representative, where it is not paid over upon the demand of the person entitled to receive it. It is of no importance that the personal representative is not named in the bond. The death of a party neither adds to nor takes from the obligations he may have assumed; and the necessary legal incidents that the law attaches to the undertakings of parties, need never be expressed.

The obligation to pay over the money rests upon the officer while he lives, and devolves upon his personal representative when he dies. It is the simple performance of a trust, and until discharged the obligation continues; and the undertaking of the sureties for the faithful performance of the duty, is no less extensive than the obligation it was created to secure.

This fund, therefore, rightfully came into the hands of the executrix, the demand was rightfully made upon her, and her refusal to pay over was a violation of the engagements of the sureties, and a breach of the bond into which they entered.

Judgment affirmed.

CHARLES McMICKEN v. THE CITY OF CINCINNATI.

A city council, in passing an ordinance to appropriate land for a street, does not act judicially, nor is the assessment of damages by the committee appointed for that purpose, a judicial act.

Under the Cincinnati charter, publication of such ordinance is sufficient notice to property holders.

It is not necessary to provide, in the ordinance, for a review of the assessment of damages; it is time enough to provide for that when a review is asked.

*BILL in chancery, reserved in Hamilton county. [395]

On the 2d of April, 1851, the city council of Cincinnati, by ordinance entitled "to open North Elm street," enacted that certain ground, specifically described, be condemned and appropriated to public use, as a street; that three disinterested freeholders of the city be forthwith appointed by resolution, to separately assess, within sixty days, the damages and benefits of each owner of property, by reason of said appropriation, and return their assessment, in writing, to the city clerk's office within ten days after making the same; and that the compensation, as ascertained under the provisions of the ordinance, be payable out of the city treasury, upon the order of council.

A resolution was passed at the same meeting of council, naming and appointing three freeholders for the purpose specified in the ordinance; on the 2d of May, 1851, they made an examination and assessment, and on the 8th of May, returned the same to the city clerk's office. In their return, they say, "they proceeded to examine the premises, and assess the damages accruing from the opening of said street, and the compensation due, and are of opinion that Charles McMicken, and others named, are not entitled to any damages." The assessment, so returned, was laid before council on the 21st of May, and referred to the law committee, who, on the 26th of September, 1851, reported a resolution, "that said street, as condemned and appropriated by ordinance, passed 2d of April, 1851, be opened forthwith," and that the street commissioners of that district "cause all obstructions thereon to be removed;" which resolution was then read and adopted.

The contemplated street was sixty feet wide, and passed diagonally through the complainant's enclosed ground, appurtenant to

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his residence, a distance of about three hundred and thirty feet. Not long after the passage of the resolution, directing the street to be opened, the street commissioners commenced pulling down 396] complainant's fence, who *thereupon, on the 12th of November, 1851, filed his bill against the city of Cincinnati in the superior court of Cincinnati, alleging, among other things, that he had no notice of the proceedings of council, nor of the action of the freeholders appointed to ascertain damages and benefits; that the proceedings are void, and confer no authority to take complainant's ground; and that if so taken, great and irreparable injury will be done to him, and praying for an injunction, etc.

At its January term A. D. 1852, the superior court refused to grant an injunction and dismissed the bill at complainant's costs. The complainant appealed from the decision of the superior court to the district court of Hamilton county.

The case was reserved by the district court for decision here.

Miner Clark & Oliver, for complainant, made the following points:

I. The proceedings of the city council concerning the appropriation of complainant's property and the assessment of damages, were essentially judicial. *United States v. James Scott*, cited in III, N. S. West. Law Jour., 25; *Striker v. Kelley*, 2 Den. 323, 326, 328, 329, 332; *President and Council of Brooklyn v. Patchen*, 8 Wend. 47.

II. Complainant was entitled to special notice of said proceedings. Publication of the ordinance in the newspaper is not a sufficient notice. *Bloom v. Burdick*, 1 Hill, 139; *Patterson v. Patterson et al.*, 11 Ohio, 35; *Owners v. Mayor of Albany*, 15 Wend. 374; *Corlis v. Corlis*, 8 Vt. 389; *Chase v. Hathaway*, 11 Mass. 224; *City of Cincinnati v. Coombs*, 16 Ohio, 186.

III. The ordinance for the appropriation and condemnation of complainant's property, by merely providing, that "the compensation shall be payable out of the city treasury," fails to provide any legal mode for him to get compensation for damages. Sec. 1 397] of act of March 7, 1842 (40 Ohio L. L. 143), *repealed by section 9 of act of March 20, 1850, sec. 2 of the act of March 16, 1839 (37 Ohio L. L.); 2 Kent's Com. 339, note; *Young v. McKenzie*, *Harrison et al.*, 3 Kelley's (Ga.) 45; *Parham v. The Justices of Decatur county*, 9 Ga. 356; *Thompson v. Grand Gulf*

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Railroad and Banking Co., 3 Howard (Miss.), 240; *Gardener v. Trustees of Newberg et al.*, 2 Johns. Ch. 162; *Bonaparte v. C. & A. R. R. Co.*, 1 Bald. C. C. 225; *McArthur v. Canal Commissioners*, 5 Ohio, 140; *Footo v. City of Cincinnati*, 11 Ohio, 408.

IV. The proceedings are ineffectual, because they do not provide for the review of the assessment or valuation of the damages. See sec. 2 of the charter (act of March 6, 1839, 37 Ohio L. L.); *Kemper v. Cin., Cal. and Wooster Turnpike*, 11 Ohio, 392; *Moorehead v. Little Miami R. R. Co.*, 17 Ohio, 340; *City of Cincinnati v. Coombs et al.*, 16 Ohio, 186.

V. All pre-existing laws of this state for the condemnation and appropriation of private property to public use were amended by the new constitution, which went into operation on the 1st of September, 1851.

The proceedings to condemn the complainant's property, were inchoate at that time; there had not been any actual taking, no entry upon and seizure of the same prior to September 26, 1851, when the city council by resolution ordered the street to be opened and the street commissioners to remove all obstructions thereon. 3 Kent's Com. 339, note; *Parham v. The Justices of Decatur Co.*, 9 Georgia, 356; *Young v. McKenzie, Harrison et al.*, 3 Kelley's (Ga.) 45; *Gardener v. Village of Newberg*, 2 Johns. Ch. 164-166.

In the progress of the proceedings and before the final consummation of the object of them, before any entry and seizure, before the opening of the street, the enabling power which must attend them, from the beginning to the end, was taken away by the new constitution, and the city, in subsequently entering upon the premises and opening the street, was a trespasser.

*The city council had no power since September 1, 1851, [398] to provide for such a tribunal of review as was required by the first proviso to the second section of the act of 1839. That act being repugnant to the new constitution, was repealed by it. *Cass v. Dillon*, 2 Ohio St. 607; *City of Cincinnati v. Coombs et al.*, *supra*.

No other argument has come into the hands of the reporter.

THURMAN, C. J. There is no ground for saying that, in passing the ordinance to appropriate the complainant's land, the city council acted judicially.

Nor was the assessment of damages by the committee appointed

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by the city council, a judicial act, for no property holder was concluded thereby—a right of review of the assessments, so far as they concerned him specially, being given, by the charter, to each owner who should ask for it.

Consequently, the proceedings are not void for want of the notice insisted upon by the complainant. The publication of the ordinance was sufficient notice, the law not requiring a special notification.

We see no objection, at least none of which the complainant can take advantage, to the provision of the ordinance for the payment of the damages, that might be assessed, out of the city treasury.

It was not necessary to provide, in the ordinance under consideration, for a review of the assessment of damages; it was time enough to provide for that when a review was asked.

We think that the complainant's property was taken, in the meaning of the constitution of 1802, when the ordinance was passed and the assessment made. Consequently, the case does not come under the provisions of the present constitution.

This disposes of all the points made by the bill and upon which it rests.

Bill dismissed.

399] *JAMES CARMAN ET AL. v. THE STEUBENVILLE AND INDIANA RAILROAD COMPANY.

A railroad company agreed with certain contractors for the construction of a part of their road. Amongst other work provided for, was that of removing, at a stipulated price, solid rock, which, it was said in the contract, "must be removed by blasting." In removing such rock, without carelessness on the part of the contractors, a large quantity of fragments was thrown against the dwelling of an adjoining proprietor, causing an injury; for which he brought an action against the company.

Held, that the maxim, *respondet superior*, does not apply to the case of employer and contractor, where the latter executes an independent employment.

But whether the owner of real property can escape liability, when such a contractor uses his property so as to become a nuisance to adjoining proprietors—*quare?*

That before a case can be made for the application of the principle expressed in this maxim, not only the relation of master and servant, must have existed, but it must appear that the servant, while engaged in the business of

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the master, has done some act, or omitted some duty, neither directed nor authorized by the master, to the injury of a third person. In such case, the master, upon grounds of public policy, is liable for the negligence or carelessness of his servant. That, in this case, the contractors had done only what they were authorized by the company to do; and as the company must be held to have assented to the unlawful act by which the plaintiffs were injured, it was liable as a joint-wrong-doer.

ERROR to the court of common pleas of Jefferson county, reserved in the district court of that county.

The original action (on the case) was originally brought before a justice of the peace.

The declaration alleges that plaintiffs are the owners of the premises; that they were in the possession of their tenant at the time of the injury; and that defendants wrongfully blasted and threw large quantities of rock, earth, and stones upon and *against the [400 dwelling-house and fences, and broke and injured them. Plea, general issue.

The bill of exceptions shows the proof to be as follows:

"It was admitted that the plaintiffs held the legal title to the premises mentioned in the declaration, and that they were in the occupancy of one Dennis Connor, their tenant, at the time of the injury complained of.

"That the defendant held the title in fee simple, by conveyance from the plaintiffs, to a strip of land adjoining that of the plaintiffs above mentioned, on which it had located its railroad.

"And the plaintiffs, further to maintain the issue on their part, gave in evidence to the jury the original agreement between the said defendant and Edward O'Sullivan—a printed copy of the rules and specifications therein referred to—and the original agreement between the said Edward O'Sullivan and Michael English, and Michael Costello, with its indorsements; copies whereof are severally attached, and marked A, B, and C (see bill of exceptions for exhibits); and also gave evidence tending to prove that the said article of agreement between said English and Costello and O'Sullivan, and the several indorsements thereon, are in the handwriting of J. G. Morris, the subscribing witness; that said J. G. Morris then was, and ever since that time has been, the secretary of said railroad company. And that said original agreement last mentioned

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has ever since that time been kept by him in the office of said railroad company.

"That after the making of the contract last mentioned, the said English and Costello proceeded to employ men to do the grading, bridging, etc., of said section No. 1 of said railroad, and were prosecuting said work under their contract. That the defendant had paid to the said English and Costello several monthly estimates for work done on said section No. 1, including the excavation of the solid rock hereinafter mentioned.

"That the said English and Costello, and the men in their employ-
401] ment, for the purposes of removing large masses of solid *rock containing more than one cubic yard each, which were lying on the line of said railroad, blasted them with powder, and thereby threw a large quantity of fragments of rock upon and against a dwelling-house and fence situated on the premises of the plaintiff aforesaid, being in the occupancy of said Connor as aforesaid, and broke and injured the said house and fences to the amount of \$90; and offered no other testimony tending to show that the persons engaged in the blasting aforesaid, were the servants or agents of the defendant."

The defendant was incorporated February 24, 1848, and is "*authorized to construct, by double or single track, a railroad from Steubenville,*" etc. 46 Ohio Stat. 256.

The contract of O'Sullivan with defendant, contains this provision:

"In the performance of the work required by their contract, and every part thereof, it is expressly agreed that the said party of the first part (*O'Sullivan*) shall conform to all instructions, in relation to the work, which may from time to time be received by said party from the chief engineer, or from any engineer having charge of the work, and shall, moreover, conform to all the 'rules and specifications,' established in relation to the construction of the road," etc.

"Rules and specifications," page 7, provide, "6. The entire work on the road shall be done in a neat, substantial, and workmanlike manner, agreeably to lines, levels, marks, and plans established, or which may from time to time be established, by the engineer in charge of the road."

Page 2. "1. By solid rock, will be understood all rock found in

masses containing more than one cubic yard, and which *must be removed by blasting.*"

Page 9. "12. If any contractor, or any person in his employ, shall at any time have performed, or be in the act of performing, any part of the work on his job, or under his contract, contrary to the 'rules and specifications,' established, or to instructions *given by the engineer, in relation to the manner of perform- [402 ing the work, any engineer shall have full authority to order all further prosecutions of said work to be stopped, which order the contractor or any person employed by him shall be bound to obey."

Page 10. "16. All building-stone, or other materials obtained from the excavation, shall be considered the property of the railroad company."

The court of common pleas ordered a nonsuit, and this is the error assigned.

Miller & Sherrard, for plaintiff in error:

The rule of *respondet superior* applies. "It is founded on the power which the superior has a right to exercise, and which, for the prevention of injuries to third persons, he is bound to exercise over the acts of his subordinates." *Blake v. Ferris*, 1 Selden, 48; *Milligan v. Wedge*, 12 Adol. & El. 737; *Lougher v. Pointer*, 5 Barn. & Cres. 560; *Quarman v. Burnett*, 6 M. & W. 497; *Rapson v. Cubitt*, 9 M. & W. 70. The most that can be adversely claimed from these cases is, that where a contract is made for the performance of a particular service, which is particularly specified, constituting what *Blake v. Ferris* denominates an independent employment, the relation of master and servant does not arise, unless, by the terms of the contract, control over the person employed is reserved by the employer.

If the right is founded, as stated in *Blake v. Ferris*, it follows, that if the defendant reserved the right to exercise such a power, its liability is fixed, whether any attempt to exercise it was ever made or not. In this argument it is assumed, that so far as this inquiry is concerned, English and Costello and their employees stand in precisely the same situation as O'Sullivan and men employed by him would have done, without the contract between the latter and English and Costello, and that the contract between them amounted simply to an assignment by O'Sullivan to English

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403] *and Costello, with the consent of the company. The assent of the company to the substitution, arises from the facts in evidence, viz.: That their secretary wrote it; they always retained possession of it; they paid the monthly estimates to English and Costello, and evidently retained out of the three monthly estimates the fifty dollars, agreed to be left there for O'Sullivan. The original contract, and the rules and specifications are referred to, and control all the parties. (See sections 7, 8, 9, 10, 11, 12, etc., of rules and specifications, and the provision of the contract, beginning, "In the performance of this contract.") The defendant reserved adequate power, and the right to exercise it to prevent all injury to the plaintiffs.

There is no reason why a railroad company shall be permitted to fill the country with a set of irresponsible men, and by calling them "contractors," claim to be exempt from liability for injuries, to those persons whose misfortune it would be, to have a railroad located in their vicinity, when they themselves are unwilling to trust them in the performance of their contracts, but subject them to the control and direction of their engineers, constantly, and in every particular. They are not what the cases denominate "contractors," while subject to the control and direction of the employer, but merely servants. (See report of a late Illinois case, Jan. No. of Livingston's Law Mag. for 1854, page 53.)

In *Hobbitt v. N. W. Railway Co.*, 6 Railway Cases, 189, there was no obligation to conform to such instructions as might from time to time be given by the engineer in charge; no right reserved to stop the further prosecution of the work in case such instructions were not complied with; no right to dismiss laborers for breach of discipline, which must be understood to embrace disobedience of the orders of the engineer in charge.

The Steubenville and Indiana railroad company might, after ordering a locomotive of a given description, send its engineers into the manufactory to interfere with, and undertake to control, the operations of the mechanics employed about the building of it, with 401] the same propriety, as the Northwestern railway *company, or its engineers, might interfere with the operations of the men in Crawshaw's employ. Upon this point, which is the test, there is no analogy to the present case.

In the case under consideration, the right to exercise this power is expressly reserved; in *Hobbitt's* case no such right existed.

The point we make is not decided in *Allen v. Hayward*, 4 Railway Cases, 104. If the removal of the embankment had been part of the work not particularly described and specified, but had been executed in the manner directed by the surveyor, then the decision would have been in point.

In these cases, the defendants reserved no control whatever over the contractors in respect to the manner in which the work should be done.

The effect such a reservation would have, is strongly intimated by C. J. Denman, in the latter case to be, that whatever the power [control] is, there is the liability, but it was unnecessary to decide that point, as it did not arise in the case.

These cases, obviously qualifying *Bush v. Steinman*, seem to establish the rule that under such circumstances, a party *may* be allowed to discharge himself from that legal intendment [of control] by contract, and hence the liability of the party is not established, until it is shown that he had such control over the person who committed the injury.

In *Blake v. Ferris*, *supra*, this qualification of *Bush v. Steinman* is acknowledged, and the judgment of the court rests upon the proposition, that the defendant had no control whatever over Gibbons, the person who furnished materials and was constructing the sewer under a contract made with Butler, whereby he agreed to furnish materials and construct in every respect according to the specifications of the street commissioners which were attached to the agreement.

The proof in the case at bar, bears no resemblance to that presented in the cases cited.

Plaintiffs also refer the court to *Hay v. The Cohoes Co.*, 2 *Comst. 160; *Tremain v. The same Co.*, *Ib.* 163; as to the [405] liability of the defendant generally, and as to the allegations and proof of negligence.

Thomas Means, on the same side :

I. If the company would have been liable for the acts of O'Sullivan, it would be liable for the acts of Costello and English. They were in every sense his agents or servants, and the principle of *respondeat superior* would apply as between them. Story on Agency, sec. 308; 1 Saund. Pl. & Ev. 349; 3 Kent, 290; *Bush v. Steinman*, 1 Bos. & Pul. 404; *Randleson v. Murray*, 8 Ad. & Ell. 109.

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II. The relations between the company and Costello and English were the same they would have been had not O'Sullivan intervened. The sub-contract was *written* by the secretary of the railroad company, was *deposited* in the railroad office, and to Costello and English directly, as to those entitled to receive, the proceeds of their labor was paid. The contract of O'Sullivan was not canceled, so far as appears, but was retained, and he was held liable to secure its completion only.

III. The defendant having been "*authorized* to construct a railroad," has no right to dispute that power, so as to escape responsibility for the consequences resulting from its exercise. *Clark v. Corporation of Washington*, 12 Wheat. 40.

IV. All corporations act by agencies, and can act in no other way. Those parties who are employed by the authorities of a corporation to do that which a corporation is authorized to do, are its agents. Such "*agencies are composed of men, who may be influenced by reprehensible motives, or tempted to do acts not warranted by law.*" "*If an individual is injured, it is right he should have redress against all upon whose account the injury was perpetrated.*" Corporations have been held liable for "*malicious acts.*" *Goodloe v. Cincinnati*, 4 Ohio, 500.

These principles apply to railroad companies. *Stevens v. Little Miami R. R. Co.*, 20 Ohio, 415.

406] *V. The language of Chief Justice Caldwell in the case last cited is a felicitous compendium of the whole law upon the subject.

VI. Is there any "*good reason*" why the case at bar should be "*taken without*" these principles? The railroad company has done that which it is "*authorized*" to do, by the only known means of doing it, *i. e.*, by procuring individuals. It has retained the most despotic control over them, in every stage of their progress, and in all departments of their work. It has paid for and enjoyed the benefit of the very labor whose results the plaintiffs have sought redress for. The plaintiffs have "*had no control or management of the thing that produced*" these results, but on the contrary, they were under the sole control and direction of the defendant. I apprehend that as a case of first impression, no difficulty could be experienced in deciding this question.

VII. In the state of Vermont, the Supreme Court has decided in accordance with the foregoing principles, that *a railroad contractor is an agent* of the corporation, in doing those things which the rail-

road company is "authorized" to do. *Vermont Central Railroad Co. v. Baxter*, 22 Vermont; 7 Washb. 365; also the Supreme Court of Illinois, in a case (*Leshner v. Wabash Canal Co.*) not yet reported, except in *Livingston's Law Magazine* for the current year (January No.), p. 53. These cases recognize the relation of principal and agent, and master and servant, to exist between a corporation and a contractor, and apply in the particular cases, the rules of liability incident to these relations. Vid. also *Semple v. London & Birm. R. W. Co.*, 1 R. W. Cases, 480. These cases fall directly within the purview of the principles enunciated in the cases of *Stevens v. L. M. R. R. Co.*, and *Clark v. Wash. City*.

VIII. It can not be claimed that the act here complained of is not the *ordinary and direct result* of that which the contractor was authorized to do. It is not a case of negligence, but of ordinary necessity. The company is just as liable as though *they had [407 ordered, and the contractors had bound themselves to make, an *excavation* by reason of which the house and fence had sunk or fallen in.

IX. Is there anything in the character of the duties, obligations, or compensation of a contractor, so peculiar that he should not be regarded as an agent of his employer, as fully, and to all intents, as the engineer under whose direction, and superintendence, and control, he does his labor? The name by which he is called, can not surely affect the relation, if it actually exist. Vid., 2 *Exchequer*, 415.

X. Corporations have been held liable, on account of injuries resulting to innocent persons, by reason of the misconstruction of works done for their benefit, and at their expense, though executed by parties not under their appointment or control, on the ground that parties should not be permitted to set in motion a power, without being held responsible for its conduct and management. *Bailey v. New York*, 2 Denio, 433. The same principle has been applied to other cases. *Bush v. Steinman*, 1 Bos. & Pul. 404; *Stone v. Cartwright*, 6 Term, 411; *Fletcher v. Braddick*, 5 Bos. & Pul. 182; *Rich v. Basterfield*, 4 C. B. 783.

XI. In cases where railroad companies have undertaken to do anything connected with the transportation of goods, and sub-let the portorage of the same by contract, they are held liable for the misconduct of all the persons employed, and the use of the names

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"contractor," "sub-contractor," or "agent," makes no difference. *Machu v. London & S. W. Railway Co.*, 2 Exchequer, 415.

XII. The counsel of the company will rely, as they did in court below, on the case of *Hobbitt v. N. W. Railway Co.*, 6 Railway Cases, 189; also, 4 Exchequer, 244, and of *Allen v. Hayward*, 4 Railway Cases, 104. These cases are distinguishable from the case at bar, and could have been decided, perhaps, without affecting its decision. It must be confessed, however, that the courts in deciding these cases, rest them upon principles, that do support the claim 408] of the defendant in this case. They *maintain the principle that a railroad contractor is in no sense the agent of the railroad company, and that to him alone must the sufferer look, in the event of injury. But after what has been decided in this state, and in the courts of other states, these cases will not be held to be law. They conflict with the cases cited from the Supreme Court of Vermont and of Illinois. They conflict with the case of *Bailey v. New York*, 2 Denio, 433, and overrule the very case, that of *Bush v. Steinman*, 1 Bos. & Pul. 404, upon which that case proceeds, and which is by it recognized as law. They are entirely adverse to every principle upon which the Supreme Court of this state rests the decision in *Stevens v. L. M. R. R. Co.*, in 20 Ohio.

XIII. The whole body of the law as applied to corporations, has been much confused, arising from the ancient ideas of courts and parliaments concerning the character of corporations. They were "artificial persons," and not real persons, and were said to have no souls. They could only act by common seal; being an "invisible body," as Blackstone says, "it can not manifest its intention, by any personal act or oral discourse." Comm. Bk. I., 475. It was questioned whether they could sue in assumpsit (1 Camp. 466), and denied that they could be sued, in that form of action. One by one these ideas have vanished, and slowly, but steadily, the laws that regulate the conduct of individuals, have been applied to them. They can incur liabilities by the same means as individuals, and are equally liable with individuals on contracts, and for torts.

XIV. An individual would, undoubtedly, have a right to construct a railroad on his own land. He would equally as well have the right to "remove rock by blasting." But if injury resulted to adjoining proprietors, would he not be liable? *Hay v. Cohoes Co.*, 2 Com. 159. If so, could he, by farming out the job, "contracting," impose the liability upon "irresponsible" persons, and so effectu-

ally screen himself behind the contract as to escape liability? Would not that be such a use of his own, *that would result [409 in the injury of others, as the policy of the law forbids?

In this respect, there is no distinction to be taken in favor of a corporation. Railroad contractors are generally transient persons, and often irresponsible when they are accessible. Their conduct is regulated by these considerations. They are careless and often reckless of the injuries they may commit in the course of their business. They are controlled and controllable only by the railroad company who employ them, who control their funds, who retain over them an almost unqualified restraint, and who can discharge them altogether on the most frivolous pretexts.

R. S. Moody, for defendant in error:

I. The question whether one is the *servant* of another, is a question that can only be decided by ascertaining and construing the contract between them, if any such exists; and it will be found upon a perusal of the authorities, which are almost all cited by the plaintiffs' counsel, that the difficulty has been, with judges who have considered those cases, to determine if the contract created the relation of master and servant, or whether there was an independent contract to perform work, by which the contractor was left at liberty to produce the result he had contracted for, by the use of means which were left to his own discretion.

On the one hand, the maxim *qui facit per alium facit per se* applies, and the master will be held responsible for the negligence of his servant, as though it were his own act. On the other hand, the act of the contractor being one in respect to which he is independent, and which is, by his contract, placed beyond the control of the other party, the contractor is responsible for it.

Were not the contract in the present case before us, it would be easy to imagine a great variety of contracts by which labor was agreed to be performed, where the contractor, in respect to some parts of its performance, would be so completely under the *control and directions of another as to be a mere servant, [410 while, in respect to the manner of executing other parts of the contract, he would be perfectly independent of his employer.

In such case, the responsibility which a master will incur for the negligence of a servant would not be the rule to apply, if the negligence of the contract or was in the execution of a part of the con-

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tract where his discretion in the use of means was beyond the control of the other party to the contract.

If, by the contract of the railroad company, the contractor might employ gunpowder at his discretion for the purpose of removing rock by blasting, without being controlled by the company, the contractor only is liable, because the injury complained of is shown by the proof to consist of negligence in the use of the means employed to excavate the rock. It is the negligence of the company, if it was their act or the act of their *servant*; otherwise, it was the negligence of the contractor, and he only is responsible for it.

By the contract between the company and their contractor, had the company the power to direct the contractor what means, or agents, or tools he should use to excavate rock? By the contract, he is to receive a certain price per cubic yard for the excavation of solid rock.

There can be no doubt that upon such a contract, the contractor would have an "independent employment," and that he might excavate the rock in such a manner as he pleased. But it is claimed that there is a provision in this contract by which, in this and every other part of the contract, the contractor is absolutely subject to all the directions which may be given him by the company.

Following section 12 of the specifications quoted by Mr. Miller, section 13 provides: "In case the contractor shall neglect or refuse to comply . . . with the instructions which may from time to time be given by the principal or assistant engineer in charge of the 411] work, . . . the chief engineer *shall have full power to determine that his contract is forfeited and abandoned, and such determination shall absolve the railroad company from every obligation imposed on them as a party to the contract."

It is for the purposes of this case, claimed by Mr. Miller, that these "instructions" in relation to the manner of performing the work which the engineer may give, and which the contractor has agreed to obey, enable the company to determine what tools shall be used, by what kind of physical agency excavation, either of earth or rock, shall be made, and to give to the engineer the absolute power to choose even who shall be employed as laborers upon the work.

It is a construction of the contract which makes the company supreme in everything; which makes the written agreement, in all its parts, saving perhaps the prices to be paid, a mere nullity. By

such construction of the 11th, 12th, and 13th specifications, they are made to override the whole contract. The contractor has said by it: "I agree to excavate earth and rock, and build bridges and masonry for your company, at a certain price per cubic yard for earth, a certain price for stone, and for masonry, but you may direct me and control me in all the physical agents I may use in doing it."

If the engineer directs him to buy powder, he must buy it; to provide carts and horses, they must be provided; or, if not provided according to directions, the company are to be absolved from every obligation imposed on them by the contract.

The contractor is engaged in making a large excavation of earth, for which he gets ten cents per yard. It has to be removed to an embankment half a mile distant, for which removal he receives, by his contract, ten cents per yard more. He is diligently engaged in removing the earth with horses, carts, and wagons. The engineer takes a whim that it shall be carried in wheelbarrows; he gives "instructions" accordingly. Or, a cut of solid rock is to be removed, for which the contractor is to *receive fifty cents per [412] cubic yard. He is able to do so at this price by blasting with powder. But the engineer gives him "instructions" that he shall remove the solid rock by picking with mattocks, or by splitting with wedges.

Mr. Miller claims that all these instructions the contractor is bound to obey, on penalty of having his contract forfeited, and the railroad company absolved from every obligation imposed on them, as a party to the contract. This, it seems to me, is the test of his whole argument; for this branch of it goes upon the hypothesis that the engineer had the power to control the contractor in the use of powder to blast the rock; that this power made the contractor, in respect to this act, the servant of the company, and not independent in the choice of the means which he might use in effecting the result he had contracted for.

I construe the power which is reserved in this contract by the company, differently. There are three phrases which the counsel has caused to be printed in capital letters, lest they might be overlooked: "Instructions in relation to the work;" "Instructions given by the engineer in relation to the manner of performing the work;" "The contractor shall be bound to obey." Upon these sentences hangs all the law. I do think that nothing but "the extreme necessity of argumentation" could ever have called from the

learned counsel an opinion that these words would bear so unconscionable a construction as to make these contractors what he now seems to claim they are. It seems to me that sufficient meaning is given to them if they are held to reserve only that ordinary power which is usually reserved in all contracts with builders, or with railroad contractors—a power which is generally expressed in substantially the same language—and which has never had claimed for it that latitude of construction which is now given to it.

When a house-builder takes a contract to build a house and furnish materials, a clause in the contract that he should obey all instructions of an architect in relation to the manner of performing the work, would be understood by everybody to be a contract which made the architect an arbiter, to determine whether the quality of material, or the style of the workmanship, was in conformity with the contract or its specifications.

A similar power, and none other, is, as I think, the only one reserved in this contract by the railroad company. Their engineer is properly made the arbiter, by this contract, to decide between the company and the contractor, whether the manner in which the work is performed is in accordance with the contract; and to hold that this gave him a power to direct the particular instruments, or the means or agents which the contractor should employ to effect that result, would be as unreasonable as to suppose that the architect might direct and control the mechanical tools by which the house-builder should execute his design.

In either case, if the result required by the architect or the engineer is attained, it is left to the contractor to choose his own means in effecting that result. This stipulation in the contract, signifies only that the contractor shall be controlled by the judgment of the engineer in any question of the manner in which the work is required, by the contract, to be performed. The difference is a distinction between the agency by which a particular manner or style of performance is attained, and the manner or style of work itself. The last the engineer may control: the first is left to the independent choice of the contractor.

RANNEY, J. We have only to consider whether the evidence given by the plaintiffs, in any degree tended to prove all the facts necessary to support the action. If it did, the court below erred in taking it from the jury, and ordering a nonsuit. That they

were entitled to recover of some one, a compensation for the injuries done to their property, is most unquestionable; and that the defendants are liable, if, under the same circumstances, a private individual would be, is now too well settled, and has been too often affirmed by this court, to require authorities to be cited, or reasons to be assigned.

*The plaintiffs and defendants were adjoining proprietors [414 of real estate. While the business of blasting rock was being prosecuted, upon the defendant's premises, for the purpose of constructing their road, a large quantity of fragments was thrown against a dwelling-house of the plaintiffs, by which it was injured. It appeared that this blasting was done by certain contractors, who had agreed with the company to construct this part of their road.

The plaintiffs insist, that the defendants are liable for the wrongful acts of these contractors, upon the principle *respondeat superior*, if not from the general obligations arising from the relation they sustained to each other, because of the power of control reserved to the company by the terms of the agreement.

On the other hand, it is claimed that this principle has no application to the relation existing between an employer and independent contractor; and that nothing contained in this agreement shows the relation to have been anything else.

Counsel, with much industry and research, have presented us with the numerous cases, decided in the English and American courts, bearing upon this subject. If the case depended upon the proper application of this principle, it might be attended with considerable difficulty. The late cases in both countries have made it very plain, that there can be no liability where the relation of master and servant, or principal and agent, does not exist; and, consequently, none where the relation is that of employer and contractor. In the one case, the principal selects the servant or agent with a view to his skill and care, and not only retains the control over all his operations, but, also, has the power to dismiss him at any time for misconduct. In the other, the contractor assumes this position, leaving the employer no control over the work, or the persons by whom it is executed, but simply the right to require the thing produced, or the result attained, to be such as the contract has provided for. But, although as between the par-

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415] ties, the relation may be that of *employer and contractor; still, if the employer retains the power of superintending the work, and directing it to be done in such manner as he sees fit, the decided weight of authority is, that it becomes his duty to see it done in a careful and skillful manner; and if he fails in this, he fails to perform his duty to third persons, and is liable for the injuries they may sustain. In general, however, it is certainly true, that the employer is not liable for the negligent or unskillful conduct of the contractor, or any one employed by him, while executing an independent employment.

But after all this the question still remains, when does this maxim, and the limitation to its operation, cease to furnish the governing principle? A principle as old as civilization itself, and no less of morals than of law, requires of every one to so use his own property as not to injure others. This devolves upon every owner of real estate the affirmative duty of preventing it from becoming a nuisance to adjoining proprietors. Whether he can divest himself of this obligation consistently with the full operation of this important principle, while he retains the possession and control of the property, so as to escape liability when he suffers it to be occupied by a contractor who erects a nuisance upon it to the injury of others, is a question that I am very far from being prepared to answer in the affirmative. And so are the English courts. In most of the late cases decided in that country, questioning, and finally overruling to considerable extent, the early case of *Bush v. Steinman*, 1 Bos. & Pul. 404, followed by *Sly v. Edgely*, 6 Esp. 6, this distinction is alluded to, and most particularly and pointedly, by Park B. in *Knight v. Fox*, 5 Exch. 721; and by Rolfe B. in *Reedie v. The London and Northwestern Railway Co.*, 4 Exch. 256; where he says, the liability of the owner in such case "must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade 416] so as to *be a nuisance to the neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor those of his servants. He would have violated the rule of law, *sic utere tuo ut alienum non lēdas*."

But it is quite unnecessary to pursue this view of the subject further, as it is very evident that the principle expressed in the

maxim, *respondet superior*, either in its larger or more restricted sense, can have no application to the present case.

Before a case can be made calling for an application of that principle, it must appear, not only that the relation of master and servant existed, but that the servant, without the assent of the master, has done some act, or omitted some duty, while executing the lawful commands of the master, to the injury of a third person. In such case, public policy and the safety of others require the master to warrant the fidelity and good conduct of the servant, and, although faultless himself, make him liable for the unlawful conduct of the servant. But when the servant has done only that which the master commanded or permitted, the latter is chargeable as a joint participator in the wrong, and made liable for his own unlawful conduct, in the same manner as though no such relation had existed. As was said by Erle, J., in *Ellis v. The Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767, where the relation was that of employer and contractor for the performance of illegal stipulations: "The act of the person who is here called the contractor was the act done by him under the special directions of the defendants; and that appears to me to distinguish this case from those in which the employer was held not liable for the act done by the contractor, not in accordance with his contract." A careful attention to the evidence given will show this case to have been of that character.

By the terms of the agreement between the company and the contractors, amongst other work to be performed by the latter, was that of removing solid rock at a stipulated price per cubic yard. By the rules and specifications made a part of the contract, *"*solid [417 rock*" is defined to be "all rock found in masses containing more than one cubic yard, and *which must be removed by blasting.*" And the bill of exceptions informs us that, in blasting "for the purpose of removing large masses of solid rock, containing more than one cubic yard each," fragments were thrown against the plaintiff's house, causing the injuries complained of.

No proof was given that the work was not prosecuted with care and prudence, or that the injury was not the unavoidable consequence of blasting in that particular locality. Now, it seems very clear, that the contractors did nothing that the defendants had not authorized to be done. But the defendants had no right to use their own lands, or authorize others to use them, so as to interfere with the undisturbed possession and lawful enjoyment of adjoining lands.

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As said by the court in *Hay v. The Cohoes Company*, 2 Com. 159: "A man may prosecute such business as he chooses upon his premises, but he can not erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. He may excavate a canal, but he can not cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he can not construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner."

We do not construe the agreement as absolutely binding the contractors to remove the rock in this particular manner. They might, undoubtedly, have adopted other and more expensive modes of doing it, without affording the defendants any cause of complaint. But nothing of that kind was contemplated. The defendants put them in possession, with the right to remove rock, wherever found, in the manner mentioned in the contract; and having enjoyed the benefits of this cheaper mode of doing the work, they can not 418] escape the responsibilities attending it. If *they reserve no power to prevent injury, where blasting could not be safely employed, they were clearly in fault in giving so unrestricted a license. If they had the power, it is almost equally clear they should have exerted it.

Being of the opinion that the evidence, given upon the trial, tended to prove the concurrence of the defendants in all the acts performed by the contractors; and believing the whole law of the case to resolve itself into the elementary proposition that whoever aids, assists, or procures another to commit a trespass (no matter with what motive, or whether intended or not), is liable as a principal to compensate for the injury done, we are brought to the conclusion, that the court of common pleas erred in nonsuiting the plaintiffs, and for that cause the judgment is reversed, and the case remanded for further proceedings.

THURMAN, C. J., dissented.

OHIO, FOR THE USE OF STORY, v. JENNINGS ET AL.

A seizure of the goods of A, under color of process against B, is *official misconduct* in the officer making the seizure; and is a breach of the condition of his official bond, where that is, that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but it is perpetrated *colore officii*.

For such breach, an action on the bond lies against the officer and his sureties.

ERROR to the district court of Erie county.

The original action was debt, upon a constable's bond, against the obligors, to wit, the constable and his sureties. The declaration was as follows:

*" *Court of Common Pleas of Erie County, of the Term of May, A. D. 1849. [419*
" The State of Ohio, Erie County, ss:

"The State of Ohio, who prosecutes this action for the use of John Story, complains of Roswell J. Jennings, Alexander H. Barber, and Robert Cassidy, in a plea of debt. For that whereas the said Roswell J. Jennings was, to wit, on the 12th day of January, A. D. 1849, legally appointed by the trustees of Portland township, as a constable in and for said township, to fill the vacancy occasioned by the resignation of T. C. Barker, as by the statute in such case is made and provided; and said Jennings, so being appointed as aforesaid, his said office of constable would not expire until the 2d day of April, A. D. 1849. And afterward, to wit, on the 12th day of January, A. D. 1849, at said Erie county, the defendants, by their certain writing obligatory, sealed by their seals, and now to the court here shown, acknowledged themselves to be held and firmly bound unto the said State of Ohio in the sum of one thousand dollars, to the payment of which, to the plaintiff, they then and there bound themselves; which said writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting to the effect following, that whereas the said R. J. Jennings had been duly appointed constable, in and for the township of Portland, in the county of Erie, and State of Ohio, by the trustees of said township of Portland, to fill the vacancy occasioned by the resignation of T. C. Barker, late constable: Now, therefore, if the said Jennings should pay over all moneys that might come into his

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hands by virtue of his said office, and should diligently and faithfully perform all the duties of said office of constable, then said obligation was to be void, otherwise to be and remain in full force. And the said state further avers, that John W. Beatty and Philander Gregg (Rollin Hubbard, who was also a trustee, being absent from town), being then and there trustees of the said township of Portland, did then and there approve of the said Alexander H. Barber and Robert Cassidy, as sureties of the said *Roswell J. Jennings, in the premises, and of the amount of said writing obligatory; and thereupon the said writing obligatory, with the condition aforesaid thereunder writtten, was delivered by the defendants to, and received by the State of Ohio, as the official bond of the said Roswell J. Jennings, with the said Alexander H. Barber and Robert Cassidy, his sureties in the premises, and then and there lodged with the clerk of said Portland township. And the said State of Ohio further avers, that afterward, to wit, on the 31st day of January, A. D. 1849 (and before the commencement of the suit hereinafter mentioned), at the said county of Erie, one Gershom Clark caused to be issued from the office of one Z. W. Barker, then and there a justice of the peace within and for the said township of Portland, and county of Erie, a certain writ of replevin, directed to the constable of Portland township, sealed with the seal of said justice of the peace, by which said writ the State of Ohio commanded said constable that, without delay, he cause to be replevied unto said Gershom Clark certain goods and chattels, which one Charles Jefferson wrongfully detained, as was said, and also summon the said Charles Jefferson to be and appear before said justice, at his office in said county of Erie, on the 3d day of February, A. D. 1849, at one o'clock, P. M., to answer to the said Gershom Clark, for the wrongful detention of said goods and chattels—damages \$25—and to have then and there the said writ; and which said writ was delivered to the said Roswell J. Jennings, the constable as aforesaid of said township, to wit, on the 31st day of January, A. D. 1849, at said Erie county, to be executed according to law. And the said state further saith that the said Jennings, so being constable as aforesaid, and having then and there said writ as aforesaid, and to be executed as aforesaid, did not, nor would execute said writ, according to law, or replevy the said goods and chattels, so detained by the said Charles Jefferson as aforesaid, but on the contrary thereof, to wit, on the 31st day of January,

A. D. 1849, at said county of Erie, the said Jennings then and *there being constable as aforesaid, carelessly, unfaithfully, [421 wrongfully, and unlawfully took from the said John Story certain goods and chattels, to wit, one two-horse wagon, two harnesses, and two horses, which were then and there the property of the said John Story, and of great value, to wit, of the value of two hundred dollars, said Jennings then and there being constable as aforesaid, and acting, as he claimed, by virtue of the said writ of replevin; and the said John Story having then and there, by reason of the misconduct of the said Jennings, constable as aforesaid, sustained great damage, to wit, the damage of two hundred dollars, did afterward, to wit, on the 9th day of February, A. D. 1849, at said Erie county, commence and prosecute an action of trespass against the said Roswell J. Jennings, before one John M. Brown, a justice of the peace within and for the said township of Portland, to recover his reasonable damages, sustained by him by reason of the said Roswell J. Jennings' misconduct, in his said office of constable, in taking from him, wrongfully and unlawfully, his property as aforesaid; and such proceedings were had in said action that the said John Story afterward, to wit, on the 17th day of February, A. D. 1849, by the consideration and judgment of the said justice, recovered of the said Roswell J. Jennings the sum of seventy-five dollars, which was adjudged to the said John Story by the said justice's court, for his damages by him sustained, for the misconduct of the said Roswell J. Jennings as constable, as aforesaid, in taking from him his property as aforesaid, and also \$5.38½, his costs, etc., as by the record and proceedings of said court, duly authenticated, and now to the court here shown, will more fully appear; upon which said last-mentioned judgment an execution has been issued and returned, March 1, 1849, no goods and chattels found whereon to levy; and which said judgment also remains wholly unpaid and unsatisfied to the said John Story, to wit, on, etc., at etc.; all of which said premises the said Alexander H. Barber and Robert Cassidy afterward, and before the commencement of *this suit, had notice, [422 to wit, on the 21st day of May, A. D. 1849, at said Erie county, and were then and there requested by the said John Story to pay the said damages last mentioned, etc., so recovered by the plaintiff, which they, and each of them, refused to do. And so the State of Ohio in fact says, that the said Roswell J. Jennings did not diligently and faithfully discharge the duties of his said office of constable, during

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his term of office aforesaid, and the said John Story, for whose use this suit is brought, hath been injured, as aforesaid, by the misconduct in office of the said Roswell J. Jennings, whereby an action hath accrued to the State of Ohio, to demand and have of and from the defendants in this suit the said sum of one thousand dollars. Yet the defendants have not, nor hath either of them, paid the same, or any part thereof, to the damage of the said State of Ohio of one hundred dollars; and thereupon the state sues, etc. And the said State of Ohio, who sues as aforesaid, brings into court here a copy of the said writing obligatory, with a copy of the aforesaid condition thereof thereunder written, which are duly certified by Jacob Hoornbeck, the clerk of the said township of Portland, to be true copies of the said writing obligatory and condition, lodged with and held by him."

To this declaration the defendants demurred generally. The common pleas sustained the demurrer, and gave judgment for the defendants, which, upon error, was affirmed by the district court. To reverse these judgments this writ was prosecuted.

H. Goodwin, for plaintiff in error, cited :

6 Wend. 454; 5 Johns. 173; 6 Ohio, 150; Swan's Stat. 162, sec. 4; *People v. Schuyler*, 4 Comst. 173; 4 Mass. 68; 11 Maine, 241; 5 Binney, 184; 4 J. J. Marsh. 299; 5 Monroe, 192; 15 Wend. 623; 8 Cow. 65; 14 Ohio, 539; 20 Ohio, 273; 10 Met. 313; 8 Johns. 185. He also cited and commented on *Carpenter v. Sloan*, 20 Ohio, 330.

423] **Lane, Stone & Lane*, for defendant in error, submitted an argument reviewing the authorities, but making no new citations.

THURMAN, C. J. The authorities seem to us quite conclusive, that a seizure of the goods of A, under color of process against B, is *official misconduct* in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer, under color of a *fi. fa.*, seize property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different if, under color of the same process, he take the goods of a third person? If the exemp-

tion of the goods from the execution in the one case, makes their seizure official misconduct, why should it not have the like effect in the other? True, it may sometimes be more difficult to ascertain the ownership of goods, than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigants, the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish.

This question was very fully discussed and considered, in a late case in the court of appeals of New York—*The People v. Schuyler*, 4 Comstock, 173; and the authorities reviewed. It was an action of debt, against a sheriff and his sureties, upon his official bond, conditioned that he would “well and faithfully in all things perform and execute the office of sheriff of said county of Rensselaer, during his continuance in said office by virtue of his election thereto, without fraud, deceit, or oppression.” The alleged breach was, that under color of a writ of attachment against one Fay, he had seized the goods of one Batchellor, for *whose use the suit was [424 brought. The court held, that the action was maintainable, and sustained their opinion by a citation of numerous authorities, English and American, which it is unnecessary to repeat.

I may add, however, that the same doctrine seems to prevail generally. See *Archer v. Noble et al.*, 3 Greenleaf, 418; *Harris v. Hanson*, 11 Maine, 241; *Skinner v. Phillips*, 4 Mass. 75; *Lowell v. Parker*, 10 Met. 309; *Cormack v. The Commonwealth*, 5 Binney, 184; *Forsythe v. Ellis*, 4 J. J. Marshall, 298; *Commonwealth v. Stockton et al.*, 5 Monroe, 129, Derby’s ed. 193.

The judgment of the district court and court of common pleas must be reversed, and a writ of *procedendo* awarded.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY v.
WATERSON AND KIRK.

In an action to recover damages against a railroad company, for the destruction of horses which were on the track of the railroad when killed, evidence was given tending to prove an obligation resting upon the owner of the land where the horses were pastured, to fence it from the railroad track; and that in consequence of the failure the horses had strayed upon the track. The court charged the jury, in effect, that the company would be liable for the negligence of its officers and agents, as though the horses were running at large, or no such obligation existed. In this charge there was error.

The company had the right to protect itself against the inconvenience and hazard of using an unfenced road.

After devolving the obligation to do this upon the owner of the land, he could not, over the breach of his contract, suffer his animals to go upon the road, without being liable for their trespass.

In such case he would be a wrong-doer, and not entitled to demand the same degree of care as though he did not occupy that position.

If the company had succeeded in establishing this fact, they could not have been charged, short of proof of intentional injury, or of that gross carelessness, involving a recklessness of consequences, which it is so difficult to distinguish from intentional wrong.

425] *ERROR to the district court of Butler county.

The defendants in error brought their action on the case, in the court of common pleas of Butler county, against the Cincinnati, Hamilton and Dayton Railroad Company, to recover damages for the killing of two horses of the defendants in error, by reason of the careless and negligent management of a locomotive and train of cars of said company, by its servants and employes.

The case was tried at the February term, 1853, of said court of common pleas, when a verdict was rendered and judgment given in favor of the defendants in error. The plaintiff in error then appealed to the district court, in which the cause was tried, with a like result, at the May term, 1853.

The horses, at the time they were killed, were pasturing in a lot adjoining the railroad of the plaintiff in error. Defendants in error had rented this lot, as a pasture, from one John Jones, who had possession of it under a verbal lease from the executors of Daniel Millikin, deceased, to whose estate it belonged. Daniel

Millikin, in his lifetime, by a paper dated December 27, 1848, had released to said railroad company a right of way through his land, on the line occupied by said road, at the time of the injury complained of. This release, among other things, provided "that said company shall pay me [Daniel Millikin] the one-half of the cost of putting up good post and board fences, on each side of said road, so far as it shall pass through my said tract of land."

On the 12th day of March, 1851, the executors of Daniel Millikin gave their receipt to said company, acknowledging payment of \$470.60, in full of half the cost of building said fences, and binding said executors to build the same.

It appears that, in March, 1851, the second engineer of the company gave permission to said executors to build the fence on the west side of said road, on the top edge of the embankment, and that Daniel Millikin, under their direction, commenced to *build said fence on the top of the embankment; that in the [426 spring of 1851, the contractor on the road objected to making the fence "at that place at that time," as it would hinder hauling up gravel to ballast the road; that cattle-guards were temporarily erected, instead of fences, to enable the proprietors to cultivate the land; that said executors rented, for the year 1851, "all the tillable land" west of said road, to John Jones, and that no fence was constructed between it and the road; that the cars commenced running on the track of the railroad in September, 1851, and that in the December following the horses of the defendants in error were killed; that said Jones had permitted said defendants to pasture their two horses upon his land, rented as aforesaid, from which they could, and did without difficulty, pass upon the railroad track; that on the day said horses were killed, about five o'clock in the evening, a train of passenger cars was going northwardly; the horses were seen upon the track; just before reaching the "backbone," the whistle sounded, the steam was shut off, and the train proceeded slowly for some distance; the steam was then let on and off several times, and the speed increased and decreased alternately, the whistle blowing at frequent intervals, until the train stopped seventy-five or a hundred yards from the New River bridge; that at the first alarm of the whistle, the horses commenced running northwardly, keeping the track, jumped the cattle-guards, and continued their course until they jumped into the bridge, and were killed.

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The district court, on the trial of the cause, among other things, charged the jury, "that the facts and circumstances in evidence, relied upon to show the want of proper care and diligence, on the part of the officers and agents of the company, in conducting the train, were for their exclusive consideration; and whether such facts and circumstances established the want of such care and diligence, or the contrary, was a question of fact, proper for the exclusive determination of the jury; and that if they should find from the evidence, that these officers and agents, in running the 427] *train, did not use proper care to prevent injury to the plaintiffs' horses, and the safety of the passengers, and that, by reason of the want of such care, the plaintiffs' horses were killed, it would be their duty to find that the horses were killed by the negligence of the defendant, notwithstanding said horses were upon the track of defendant's railroad, in consequence of a want of fences, which the plaintiffs, or those under whom they claimed, were bound to construct, or from being left to run at large by the owner."

The defendants below (here plaintiffs) moved for a new trial, on account of the alleged error of the court in instructing the jury, and because the verdict was against the weight of evidence. The overruling of this motion is assigned for error, as is also the overruling of a motion in arrest of judgment.

Thomas Millikin, and Scott & McFarland, for plaintiff in error:

I. The Supreme Court may reverse the judgment of the district court, in refusing to grant a new trial when the motion is made on the ground that the verdict is against the weight of the evidence. Act of March 12, 1845, vol. 43, p. 80; act of March 23, 1852, vol. 50, p. 93; act of April 30, 1852, vol. 50, p. 102; same vol. p. 67, sec. 4; *Shepler v. Dewey*, 1 Ohio St. 331; *Lessee of Beardsley v. Chapman*, 1 Ohio St. 125.

II. The allegation in the declaration, that the horses were killed "by the mere negligence of the defendant's agents," is a material allegation. 1 *Swan's Prac. and Prec.* 436.

III. The court erred in instructing the jury as to the exclusive consideration and determination by the jury of the question of negligence. The question what degree of care and diligence is required of the defendant, under the circumstances of the case, must neces-

sarily be a question of law. Whether this requisite degree of care was in fact exercised, is admitted to be a question of fact merely.

*IV. When the negligence or wrongful act of the plaintiff [428 co-operates with the negligence of the defendant to produce the damage, an action will not lie. *Blyth v. Topham*, Cro. Jac. 158; *Bush v. Brainard*, 1 Cowen, 78; *Sarek v. Blackburn*, 4 C. & P. 297; *Blackman v. Simmons*, 4 C. & P. 138; *Brock v. Copeland*, 1 Esp. 203; *Howland v. Vincent*, 10 Metc. 371; *Jordin v. Crump*, 8 M. & W. 782; *Brownell v. Flagler*, 5 Hill, 282; *Cook v. The Champ. Trans. Co.*, 1 Denio, 99; *Story on Bail*, secs. 19, 22; *Gardner v. Heart*, 3 Denio, 255; *S. C. 4 Comst.* 349; *Marsh v. N. Y. & Erie R. R. Co.*, 14 Barb. S. C. 364; *Suydam v. Moore*, 8 Barb. 358; *Waldron v. The Rensselaer and Saratoga R. R. Co.*, 8 Barb. 390. The case of *Quimby v. Central R. R. Co.*, 23 Vt., 387, is really an authority in favor of plaintiff in error.

In that case, the plaintiff was *not* bound to construct the fence, the want of which occasioned the injury complained of; and as the court places its decision expressly on that ground, the inference is fair, that had the fact been otherwise, the decision would have been for the defendant. That very circumstance, then, which, in the case at bar, the jury were instructed to consider as wholly irrelevant and immaterial, was in that case regarded as so vitally important as to be decisive of the case. The weight of American authorities is largely against the principle decided in the case of *Davies v. Mann*, 10 M. & W. 545; but even admitting it to be law, the case is by no means analogous to the one at bar. That was a case in which the injury complained of was done on a public highway, to the use of which the plaintiff and defendant were equally entitled, and in which the plaintiff was bound by no special contract with the defendant, to secure him in the undisturbed and exclusive use of the *locus in quo*, by the erection of suitable fences.

(Counsel for the plaintiff in error also referred to the following cases: *New York and Erie R. R. v. Skinner*, Am. L. Reg. for December, 1852, p. 97, and notes appended by the editor; *Louisville and Frankfort R. R. Co. v. Milton*, West. L. Journal for [429 August, 1853, p. 483; *Edward Williams v. Michigan Cen. R. R. Co.*, 4 U. S. Monthly Law Mag. 281; *Jackson v. Rutland and Burlington R. R. Co.*, Liv. Law Mag. for January, 1854, 44, and authorities there cited.)

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James Clark, for plaintiff in error.

I. The negligence of the plaintiff, in order to preclude him from a recovery for an injury caused by the negligence of the defendant, must amount to a want of ordinary care. *Butterfield v. Forrester*, 11 East. 60; *Chaplin v. Hawes et al.*, 3 Car. & Payne, 554; *Bridge v. The Grand Junction Railway Co.*, 3 Mee. & Wels., 244; *Lynch v. Nurdin*, 1 Adol. & El. 35; *Birge v. Gardiner*, 19 Conn. 512; *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566; *New Haven St. and Tr. Co. v. Vanderbilt*, 16 Conn. 420; *Marriott v. Stanly*, 1 M. & G. 568; *Smith v. Smith*, 2 Pick. 621; *Thompson v. The Inhabitants of Bridgewater*, 7 Pick. 188; *Lane v. Crombie*, 12 Pick. 177; *Adams v. The Inhabitation of Carlisle*, 21 Pick. 146; *Washburn v. Tracy*, 2 Chip. 28; *Bird v. Holbrook*, 4 Bing. 628.

II. The negligence of the plaintiff to preclude him, must *proximately* conduce to the injury of which he complains. *Davies v. Mann*, 10 Mee. & Wels. 545; *Flower v. Adam*, 2 Taunt. 314.

III. The decisions relied on by the plaintiff in error, are based upon a rule of the common law, which does not exist in Ohio. *Swan's Stat.* 410, sec. 8; *Seely v. Peters*, 5 Gilm. 130. But even where the common law upon this subject has been held to prevail, the absurd deduction has not been *uniformly* drawn from it, that animals permitted to run at large by the owners became therefore outlawed. *Jackson v. Rutland and Burlington R. R. Co.*, reported Jan. No. Livingston's Monthly Law Mag., 1854; *Ricketts v. E. & W. India Docks & Birm. Junc. R. R. Co.*, 12 Eng. Law & Eq. 520. 430] *IV. The case of *Quimby v. Central R. Co.*, 23 Verm. 387; very nearly resembles that at bar.

V. "There is no distinction between railroads and ordinary highways in regard to the degree of care, which the law requires on the part of those who have the direction or management of vehicles upon them." *Beers v. Housatonic R. Co.*, 19 Conn. 566.

VI. The court was not bound to say anything to the jury as to what degree of want of care, on the part of the agents of the railroad company, would render it responsible, unless requested by one or both of the parties. *Jones v. State*, 20 Ohio, 45. But there was no erroneous instruction given. The most that can be said is, that the court failed to instruct upon that question: but whether the facts and circumstances established such care, or the contrary, was a question of fact, and as such properly left to the jury. All complex issues, in which law and fact are intimately blended, are

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necessarily left to the jury, the court, in its discretion, instructing or not instructing them, in regard to the matters of law. 1 Greenl. sec. 49. But the bill of exceptions does not profess to give more than an extract from the charge of the court. How then, do we know from the record, that the court did not, in some other part of their charge, fully instruct the jury, as to what constitutes *proper care*? Error is not to be presumed. All intendments of law, are in favor of the validity of judicial proceedings. *Coil v. Willis*, 18 Ohio, 28.

VII. Where the language of a verdict is equivocal, the court will give it such meaning as to give effect to the verdict; and every reasonable construction is to be adopted in its favor. *Carr v. Stevenson*, 5 Humph. 559; *Aye v. Maxwell*, 14 Vt. 14; *Huntington v. Ripley*, 1 Root, 321. But the plaintiff is not bound to aver in his declaration, what *degree* of want of care, on the part of the defendant, caused the injury complained of.

VIII. A motion for a new trial, especially on the ground that the verdict of the jury was against the weight of evidence, *is [431 always addressed to the sound discretion of the court; and unless authorized by express statute, a court of error can not review the exercise of that discretion. *Marine Ins. Co. of Alexandria v. Young*, 5 Cranch, 191; *Norwich & Worcester R. Co. v. Cahill*, 18 Conn. 484; *Henderson v. Moore*, 5 Cranch, 11. The law was the same in Ohio till modified by the "act to regulate the judicial courts, and the practice thereof," passed March 12, 1845; 43 Ohio Stat. 80. That statute took away the right of appeal to the Supreme Court, in cases at law; and provided, by way of compensation, that the opinion of the court of common pleas, or superior court of Cincinnati, in overruling a motion for a new trial, might be reviewed in the Supreme Court on error. This statute has been repealed by the "new code;" but, were it still in force, it could have no applicability to a case, in which a motion for a new trial had been overruled by the district court, for two reasons: 1. The reason of the statute, viz: the absence of a right of appeal from the court in which the case was first tried, has ceased to exist. 2. The statute, by its terms, is confined to cases in which motions for new trials have been overruled by the court of common pleas, or the superior court of Cincinnati—of neither of which courts, as organized at the time of the passage of said act, is the present district court the representative or successor.

RANNEY, J. This case was elaborately argued, upon the general question of the liability of railroad companies for the destruction of stock running at large, before the case of *Kerwhacker v. Cleveland, Columbus and Cincinnati Railroad Co.*, 3 Ohio St. 172, was decided by this court. The decision in that case has made it unnecessary to examine the general question in this. I fully concurred in the judgment of reversal rendered in that case; but not altogether in the grounds upon which it was placed, or the reasoning by which it was supported. But as my difference related rather [432] to the inapplicability of some of the *principles invoked, than to their abstract correctness, I did not then deem it necessary to express a separate opinion. I will, however, take this occasion to say, that, in my judgment, the owner of domestic animals, in suffering them to run at large under the limitations expressed in the statute, is in no fault; and that there is, therefore, no room for the application of the doctrine which determines when a party in the wrong, may, nevertheless, recover for injuries arising from the negligence of another.

In other words, the owner has a perfect right to suffer his animals to go at large, without incurring any responsibility to the owners of uninclosed grounds, upon which they may wander. I am aware, that this is flatly opposed to the common-law doctrine upon the subject, and if that rule of the common law was in force in this state, would be entirely inadmissible. But it is not in force; and it is not in force because, in addition to being utterly inconsistent with our legislation, it lacks all the essential requisites that give vitality here to any principle of the common law, and is opposed to the common understanding, habits, and even necessities, of the people of the state.

Indeed, with the strict enforcement of such a rule, the state never could have been settled. The lands were all heavily timbered, and the introduction of domestic animals, from the scarcity of herbage, requiring a wide range for their support, became indispensable before the forests could be removed. It would have been a novel proposition to a hardy pioneer, when he listened in the morning for the bell that indicated where the oxen that hauled together his logs for burning, might be found, to have told him that his cattle were trespassers on every other man's uninclosed land upon which they might have fed during the night; or that he could plant corn with-

out inclosing the ground, and sue his neighbor whose cattle had eaten it up.

Nobody, either lawyer or layman, ever thought of such a thing. The practice of letting cattle go at large was considered as a *right*, treated as a right, and regulated by numerous statutes as *a right*. So early as 1792, it was expressly provided, "That [433 the open woods and uninclosed grounds within the territory, shall be taken and considered as the common pasture or herbage of the citizens thereof, saving to all persons their right of fencing" (5 Ch. Stat. 125); and although this specific provision has not been continued, the multiplied regulations as to strays, fences, and inclosures, since passed and still in force, and which are referred to in the case I have cited, abundantly show that the general assembly has always entertained the same opinion.

Railroad companies have been incorporated with the capacity to acquire lands, and placed under no obligation to fence, as a condition to using them for the purpose of running trains. They hold them as other proprietors do, and if they see fit to leave them unfenced, they can no more treat the intrusion of domestic animals as a trespass than other proprietors can. It has therefore always seemed to me, that suffering cattle to run at large, and running trains upon an unfenced railroad, were each equally lawful—binding the owners of each to submit to the inconveniences and increased hazards of using their property in that manner—but subjecting neither to the imputation of unlawful conduct, so as to give or bar a right of action, when either right had been fairly and reasonably exercised. And that the legal consequence was that each, as against the other, was entitled to require the exercise of reasonable and ordinary care to prevent injury. This I regard as the fair result of our present legislation. If a change is desirable, it belongs to the general assembly to make it, by either requiring the railroad companies to fence, or prohibiting cattle from running at large; but neither can be done by the judiciary: especially in view of the fact, that the legislature has repeatedly refused to do either.

This conflicts with no decision made elsewhere. In every case where the owner of cattle has been denied a remedy for their destruction by the carelessness of railroad agents, the common-law doctrine was in force; and the cattle were held to be trespassers *on the uninclosed road*. The remedy was denied because [434 the unlawful act of the owner directly contributed to the injury.

C., H. & D. R. R. Co. v. Waterson and Kirk.

This may be a correct conclusion, when the injury has resulted from mere negligence, and still be very far from being correct when no such unlawful conduct is established.

In this case, we should find no fault with the charge of the court if the case had depended wholly upon the relative rights and obligations of the owner of the cattle running at large and the railroad company. The court were right in saying that the facts and circumstances relied upon to show a want of *proper* care, were for the exclusive consideration of the jury; and if more specific instructions, as to the degree of care required, were wanted, they should have been asked for. Of still less importance is the criticism, predicated upon the awkward wording of the bill of exceptions, as to the same care being required to prevent injury to horses as for the safety of passengers. This part of the charge, if it had any application, was in favor of the company; as it made the safety of the passengers the first object of attention, and allowed the destruction of the horses if necessary to that end.

But the company gave evidence tending to prove an obligation resting upon the owner of the land where the horses were pastured to fence it from the railroad track, with which he had failed to comply, and in consequence of the failure, the horses had strayed upon the track. This evidence was, in effect, taken from the jury, and they were told that the company would be liable for the negligence of its officers and agents, as though the horses were running at large, or no such obligation had existed. In this, we think, there was error. The company had the right to protect itself against the inconvenience and hazard of using an unfenced road. After devolving the obligation to do this upon the owner of the land, he could not, over the breach of his contract, suffer his animals to go upon the road without being liable for their trespasses. In such [435] case he would be a wrong-doer, *and not entitled to demand the same degree of care as though he did not occupy that position. If the company had succeeded in establishing this fact, they could not have been charged, short of proof of intentional injury, or of that gross carelessness involving a recklessness of consequences which it is somewhat difficult to distinguish from intentional wrong. As the plaintiffs below occupied this ground under the owner, we think they are subjected to the same rule.

The judgment is reversed, and the cause remanded for further proceedings.

GEORGE W. DUNN v. ISAAC HAZLETT.

Where two are sued as joint contractors, one of whom resides in the county in which the suit is brought, and the other in another county, and service of a summons is made on each in the county in which he resides, and it turns out that the person residing in the county where the action is brought is not liable as a joint contractor, the plaintiff ought not to recover against the one residing in the foreign county.

In such case, the person residing out of the county can be required to answer in another county upon the ground only that a joint contractor resides, and is sued, in the county where the action is brought.

In such case, if the person residing in and the person residing out of the county, jointly plead to the merits, and the court find that they were not joint contractors, and nonsuit the plaintiff, it is error in the court to set aside the nonsuit, with leave to the plaintiff to strike out the name of the person residing in the county, and proceed against the one residing out of the county alone.

After such leave granted, it is error in the court to refuse to dismiss the proceedings, for the reason that no service of a summons was made within the county where suit was brought.

PETITION in error, to reverse a judgment of the court of common pleas of Clinton county.

*The case is stated in the opinion of the court:

[436

Mr. Hinkson, for plaintiff in error.

Mr. Harlan, for defendant in error.

KENNON, J. The record and bill of exceptions taken by the petitioner in this case, show the following facts, viz.: That the action was originally brought by Isaac Hazlett against George W. Dunn and Joseph Smith, as partners, for a breach of contract; that at the time of the commencement of the action, Smith resided in Clinton county, and Dunn in Ross county; that a summons was issued to each county, and one served on Smith in Clinton, and the other on Dunn, in Ross county, requiring him to appear in Clinton to answer to the plaintiff's demand.

A declaration was filed against both defendants, jointly. They appeared and plead the general issue, and the issue of fact thus made was submitted to the court. The court found that Smith was not jointly bound with Dunn, and nonsuited the plaintiff. On the

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motion of the plaintiff, the nonsuit was set aside, at the costs of the plaintiff, at the trial term. A motion was then made by the plaintiff for leave to file an amended declaration, by striking out the name of Smith in the proceedings, and declaring against Dunn alone. This last motion was resisted by Dunn, but the court sustained the motion, and an amended declaration was filed against Dunn alone. To the amended declaration Dunn plead the general issue; a trial was had by the court without the intervention of a jury; the issue found for the plaintiff; damages assessed, and judgment rendered in favor of Hazlett, against Dunn, for damages and costs. Dunn moved an arrest of judgment, and assigned for cause, that he was not a resident of Clinton county, but of Ross, and that the service of the writ was made on him in Ross county; but the court overruled that motion also.

The first question presented on this record for the consideration of the court is, whether, when two are sued as joint contractors, 437] *the one residing in and the other out of the county in which the suit is brought, and service is made on each, and it turns out, on the trial, that the one residing in the county is not liable as a joint contractor, the action can proceed against the one residing in another county, and upon whom service was made, in the county in which he resided, and not in the county in which the action was brought.

By section 7 of the act entitled an act to regulate the practice of the judicial courts (Swan's old Statutes, 652), it is provided, that if two or more persons are bound jointly, or jointly and severally, by any bond or writing obligatory, bill of exchange, promissory note, or other contract, and the persons so bound shall reside in different counties, it shall be lawful, in an action to be brought on such bond, writing obligatory, bill of exchange, promissory note, or other contract, to file with the clerk of the court, of the county in which either of the parties so bound shall reside, and against whom a writ of summons or *capias ad respondendum* shall have been directed, a præcipe, directing that a summons or *capias ad respondendum* be issued to the sheriff or coroner, of the counties in which such other person or persons, so bound as aforesaid, may reside, or may be found, who shall issue the said writ or writs, as by said præcipe shall be directed; and the sheriff, or other officer, shall execute and return the same, in the same manner and under the same penalties as if the *capias ad respondendum* or summons

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had issued from the clerk of his county ; and the court "to whom such writ is returned, shall proceed in the same manner thereon as if it had been returned by the sheriff of their own proper county."

As a general rule, civil actions can be brought only in the county in which the defendant resides, or may be served with process ; and in the case under consideration, the defendant, Dunn, being a resident of the county of Ross, could not have been sued in the county of Clinton, and process served on him in Ross, unless the plaintiff had at least claimed that he was jointly *bound [438 with some other person, who actually resided in Clinton county.

The 7th section, above recited, is an exception to the general rule, and applies only to cases where one of two or more joint obligors or contractors *resides* in the county in which suit is brought. If the action had been brought against Dunn alone, in Clinton county, and process of summons issued against him to the sheriff of Ross, and actually served on him, the summons and service would, on motion, have been quashed by the court. The real question here is, whether Hazlett can, by joining Smith, who resides in Clinton county, with Dunn, who resides in Ross, upon the mere pretext that they are partners, and jointly bound as contractors, compel Dunn, alone, to answer to an action in a county in which no process was served upon him, and in which he does not in fact reside. If he could, then all any creditor would have to do, would be to join in the action, in any county in which he pleased to bring his suit, a person resident therein, and bring to that county the real debtor, from any county in the state, even the most distant. To put such a construction on section 7 of the act referred to, would be to make it operate upon persons never intended to be included within its provisions. By such construction, it would include several as well as joint contractors, when, by the express provisions of the statute, it extends to joint contractors only, and would enable a creditor to do that indirectly which he could not do directly. The very condition upon which a debtor can be made to answer, by summons or *capias ad respondendum*, in any other county than that in which he resides, was, that he was sued jointly with one who was in fact a joint contractor with him, and who resided in the county in which the suit was brought.

In this case, however, the court expressly found, on evidence, that Smith, who resided in Clinton county, was not a joint con-

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tractor with Dunn, but still permitted Hazlett to amend his declaration, so as to leave out Smith from the proceedings, and 439] *declare against Dunn, as though he had been severally sued and process served on him, in Clinton county. In this, we think the court of common pleas erred.

It may be claimed, however, that Dunn waived any right he might have by pleading to both the first and second declarations. As to pleading to the first declaration, he put in issue, by the general issue, the very fact of whether service was properly made on him, or whether he was bound to answer in that court. He denied that he had *jointly* contracted with Smith to the plaintiff, and the court found his plea true, and nonsuited the plaintiff, and judgment was rendered against him for costs. The case was, thereupon, properly out of court, and Dunn had effected everything which he could expect by his plea of the general issue.

Afterward, on motion of the plaintiff, the nonsuit was set aside, and "leave granted to the plaintiff to amend his declaration by striking out the name of the defendant, Joseph Smith, and to proceed against George W. Dunn." At this stage of the proceedings, Dunn, by his counsel, moved the court to dismiss the case for want of jurisdiction against him, the said Dunn, but the court overruled his motion.

The record showed that no process was served on Dunn in Clinton county. That he was not a joint contractor with Joseph Smith, had, on trial to the court, been found true, and yet the court not only set aside the nonsuit, but granted leave to the plaintiff to declare and proceed against Dunn alone, in the same manner as if he had been sued alone, and a proper service made on him. In all this we think the court erred, and this error was not cured by either the plea to the first or second declarations; surely, not by pleading to the joint action, in which Dunn succeeded, and the error was committed by the court before pleading to the second, both in allowing the plaintiff to proceed against Dunn alone, and in refusing to dismiss the suit, on the motion of Dunn, for want of service on him in the county in which suit was brought; we think that, after this last error was committed, Dunn did not waive his rights by pleading to the merits.

440] *The judgment of the common pleas is therefore reversed, with costs.

THURMAN, C. J., did not sit in this case.

ELI BAILEY v. THE STATE OF OHIO.

Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court trying the cause, may require the prosecutor to elect upon which charge he will proceed; but the action of the court, in this respect, being a matter of discretion, can furnish no ground for a writ of error

Several distinct offenses may be joined in different counts of the same indictment, as a general rule, either where they arise out of, and are connected with, the same transaction, or where they are connected by the same subject-matter.

Where an indictment contained seven counts, and the verdict was not guilty upon the sixth and seventh counts, and guilty on the first, second, third, fourth, and fifth counts, the verdict is equivalent to a general verdict of guilty on the first five counts

Where the defendant is found guilty upon several distinct counts of an indictment, some of which are bad and some good, a judgment and sentence in general terms, on such a verdict, is not erroneous, provided the sentence be proper, and warranted by the laws applicable to the good counts.

WRIT of error to the court of common pleas of Ashland county. Reserved in the district court for decision here.

At the March term, 1854, of the common pleas of Ashland county, the plaintiff in error was indicted, tried, convicted, and sentenced to five years' imprisonment in the penitentiary, for the crime of selling, bartering, and disposing of false, forged, and counterfeit bank notes. The indictment contained seven counts—six under section 29, and one under section 22 of the statute for the punishment of crimes. The first, second, *third, and fifth counts [441 were for selling, bartering, and disposing of certain false, forged, and counterfeit bank notes; the sixth and seventh counts for having the same in possession with intent to pass, etc.; and the fourth for disposing of a certain false, forged, and counterfeit negotiable promissory note. On the trial, exceptions were taken by the plaintiff in error to the ruling of the court. The jury in their verdict found as follows, to wit: "That the said Eli Bailey is guilty in manner and form as he stands charged in the first, second, third, fourth, and fifth counts of the indictment, and not guilty as he stands charged in the sixth and seventh counts thereof." The plaintiff in error moved for a new trial, and also in arrest of judgment, but the mo-

tions were overruled by the court, to which the plaintiff in error excepted.

Fulton & McCombs, Given & Jeffries, and P. B. Wilcox, for plaintiff in error.

G. W. McCook, attorney-general, for the state.

BARTLEY, J. The following alleged errors are relied on as ground for the reversal of the judgment :

1. That the court overruled the motion of the plaintiff in error, to compel the attorney for the state to elect upon which of the charges in the indictment he would proceed.

2. That the indictment is bad for repugnancy, on the ground that the terms *false, forged, and counterfeited*, as applied to spurious paper, are inconsistent.

3. That the indictment contained a misjoinder of offenses, one of the counts being for an offense under section 22, and the others under section 29 of the statute.

4. That the verdict was not a general verdict of guilty, but a special verdict, inasmuch as it found against the plaintiff in error, upon each of the first five counts, and for him on the two last counts of the indictment, and that, the two first counts being fatally defective, the court erred in refusing to arrest the judgment.

442] *Of these in their order :

1. When an indictment charges two or more distinct offenses, differing in their nature, or arising out of distinct and different transactions, the court may compel the prosecutor to elect upon which charge he will proceed. But such election will not be required to be made, where the several charges in the indictment relate to the same transaction, or are simple variations or modifications of the same charge, with a view of meeting the proof. The exercise of this authority, however, to compel the prosecutor to make the election, rests in the sound discretion of the court. And where an act, or an omission to act, rests in the discretion of the court, it can not lay any foundation for a writ of error.

2. The second assignment of error, which is founded on a supposed repugnancy in the terms used as descriptive of the spurious paper, presents a question which was directly settled in the case of *Stoughton & Hudson v. The State of Ohio*, 2 Ohio St. 563, against

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the position of the plaintiff in error, in this case. And we see no reason to disturb that decision.

3. Was the indictment bad for misjoinder of offenses? It appears to be settled, that different and distinct offenses of kindred character, may be charged in separate counts in the same indictment. This was held in the case of *Barton v. The State*, 18 Ohio, 221, where the accused was charged in one count with horse stealing, and in another count with grand larceny of other property; crimes under different sections of the same statute. And the same doctrine seems to have been recognized in *Wilson v. The State*, 20 Ohio, 26, in which the party was charged with "an assault with intent to commit a murder" in one count, and in another count with "shooting with intent to kill." In Massachusetts, it is said to be the practice to join counts for distinct felonies, when framed under different sections of the same statute: *Com. v. Hope*, 22 Pick. 1. And in Tennessee, it seems, that the joinder of several distinct felonies of the same degree, although committed at different times, was no *ground of demurrer or arrest of judgment: *Cash v. The* [443 State, 10 Humph. 111. The limit to the rule, however, allowing distinct offenses to be joined in the same indictment, has not been defined by the adjudications on the subject, with that degree of precision and certainty which is desirable. In this state, it would seem to have been limited chiefly, either to offenses arising out of and connected with the *same transaction*, such as burglary and larceny, or horse stealing committed at the time of a larceny of a buggy or other property, or the uttering and publishing of counterfeit bank notes together with a forged promissory note, etc.; or to offenses connected by the *same subject-matter*, such as the making of counterfeit and spurious paper, and the uttering and publishing the same, etc. In any view of the subject, however, it requires no enlargement of the rule, to show that there was no misjoinder in this case.

4. Conceding that the first, second, and fourth counts of the indictment were fatally defective, did the court below err in rendering judgment on the verdict? No objection to the verdict can arise from the acquittal, on the sixth and seventh counts. Where an indictment contains numerous counts, there may be a verdict of not guilty as to one or more counts, and a general verdict of guilty as to the several remaining counts. And this is not what is technically termed a special verdict. A general verdict of guilty in manner

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and form as the defendant stands charged in the indictment, is a finding of the defendant guilty upon each of the several counts of the indictment; and the verdict would not be any more specific if the several counts were specified in the verdict by their numbers. The verdict, therefore, of guilty on the first, second, third, fourth, and fifth counts of the indictment, in this case, is equivalent to a general verdict of guilty on the five first counts. A practice has prevailed both in England and in this country, where there has been a general verdict of guilty on an indictment containing several counts, some bad and some good, to pass judgment on the counts 444] *that are good; and a judgment and sentence generally, on such a verdict, is held not to be erroneous, as the presumption of law will be that the court awarded judgment on the good counts, providing the judgment and sentence be such as is warranted by the laws applicable to the offense charged in the good counts. It is true, this practice has been somewhat disturbed in England, by the late decision of the house of lords, in O'Connell's case, 11 Clark & Fin. 15, wherein the judgment of the court of queen's bench of Ireland, on an indictment containing some good and some bad counts, was reversed because the judgment was entered generally on the verdict, instead of being entered severally on the good counts. The facts, however, that this decision was made under the influence of high political excitement, and carried by a bare majority, lord Lyndhurst and lord Brougham with others dissenting, have so far weakened its authority that it has not been allowed to shake a practice which had obtained very generally, and with but little variation, in the American courts. And even in England, as it would seem, it has not been quietly acquiesced in. *Irvine v. Douglass*, 3 Eng. 23.

It has been held, that an exception to this rule prevails in Virginia, in cases punishable by imprisonment in the penitentiary, inasmuch as the evidence applicable to the bad counts may aggravate the punishment imposed by the verdict, where the jury is authorized to ascertain the term of the imprisonment. *Mowbray v. Com.*, 11 Leigh, 643. But the Supreme Court of Massachusetts, in *Kite v. Com.*, 2 Metcalf, 581, adjudged, that where an indictment charged a burglary in one count, and a larceny, on the same day, in another count, and a general verdict of guilty was returned, the judgment, whether the sentence was proper for burglary only, or for burglary and larceny, could not be reversed on error, because the

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record did not show whether one offense only, or two offenses, had been proven on the trial, on the ground that the sentence will be presumed to have been according to the law that was applicable to the facts proven.

*In the case before us, the judgment and sentence of the court [445 would have been proper under either the third or the fifth count of the indictment, the sufficiency of either of which is unquestioned. Inasmuch, therefore, as the verdict was equivalent to a general verdict of guilty on the five first counts of the indictment, and the sentence was warranted by the law applicable to the offense charged in the good counts, the presumption of the law prevails that the court awarded judgment on the good counts.

The judgment of the common pleas affirmed.

HIRAM CLYDE v. MOORE SIMPSON ET AL.

A. S., by his will, devised all his real and personal property, subject to the payment of his debts and the support of his widow, to M. S., and directed him to pay a specific amount of money to each of his other children. M. S., after accepting the devise and taking possession of the property, sold the real estate to one having notice that the legacies were not paid, and that the purchase money was not to be applied to their payment.

Held, that the legacies were a subsisting charge upon the property.

Express words are not necessary to charge pecuniary legacies upon the real estate. An intention to do so may be derived by implication.

But where a devisee is not directed to pay such legacies, and they are sought to be charged upon the property devised, on failure of the personal fund, or in exoneration of that fund, the language of the will must be so explicit as to enable the court to see clearly that the testator contemplated such charge, and intended to provide for it.

'If the devisee is required to pay them as a part consideration for the property, the law attaches an equitable lien for the security of the legatees, unless it clearly appears that the testator intended to exonerate the property from the charge.

In the one case, the burden can not be established without a clear conviction that the testator intended it; in the other, the burden being express, the charge will exist, unless it appears with equal distinctness that the testator intended otherwise.

*A devisee in trust, or subject to such a charge, has the power to sell the [446 estate.

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But where the trust or charge is of a defined and limited nature, the purchaser must see to the application of the purchase money; otherwise, when it is general and unlimited.

In either case, when the purchaser has notice that the devisee is committing a breach of trust, or that the purchase money is not to be properly applied, he will be compelled to hold the property subject to the charge.

IN chancery; reserved in Ross county.

The bill was filed July 27, 1849, by the complainant, chiefly for the purpose of determining whether certain legacies given by the will of Andrew Simpson, deceased, to his children and grandchildren, were charges on the land devised by said Andrew Simpson to his son, Moore Simpson, and which the complainant claimed to have purchased from said Moore; and, in case said legacies were charged on said land, whether the complainant, as such purchaser, was bound to see to the application of the purchase money.

The case made by the bill is this: On May 31, 1837, Andrew Simpson, of Ross county, Ohio, made his last will. He died in October, 1841, and on November 1 of that year his will was admitted to probate, and letters testamentary granted to Andrew Simpson, the executor named therein, who thereupon qualified as such executor.

The devises contained in the will are as follows:

"Item.—I give and devise unto my son, Moore Simpson, my plantation I now reside on, being a part of section No. 19, township 9, of range No. 20, northwest quarter of said section; and also $47\frac{1}{2}$ acres of the southwest quarter of section 18, township 9, range 20; and also all my personal property at my decease, except 2 cows, 5 sheep, and 5 hogs, on condition that I and my beloved wife Bethiah shall have and receive a reasonable support out of the effects or produce of the above-named farm the whole term of our natural lives; and, finally, my will is that, after my and my beloved

447] wife's decease, *the whole of my personal property shall pass to my son, Moore Simpson, with the real estate as above stated; and that my son, Moore Simpson, shall pay to the five children of my son, John Simpson, deceased, to wit, Bethiah, Robert, Nancy, Elizabeth, and Jesse Simpson, being heirs at law, \$250; and also Moore Simpson pay to my daughter, Elizabeth Hanson, wife of Hollis Hanson, late Elizabeth Simpson, \$220; to my son, William Simpson, \$20, he having received \$200 at my hand already, which makes in all \$220; and also that my son Moore pay to Matthew

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Simpson \$220; and to my daughter, Sarah Van Gundy, wife of Peter Van Gundy, \$220; and also that my said son Moore shall pay to my son James \$20, he having received \$200 already, amounting in all to \$220; and also that my son Moore shall pay to my son Andrew \$220—the one-half of the above legacies to be paid to the above-named heirs, by my son, Moore Simpson, in six months after my decease, and the other half in six months after my wife's decease."

That the said Moore accepted said devises made to him as aforesaid: [and the proof shows that he took possession of the property described in the will, as early as the date of the will in 1837, and has continued in possession ever since; and that said Moore had, prior to the filing of the bill, paid off all of said legacies, except one moiety of that due Mrs. Hollis Hanson, and the whole of that due the heirs of John Simpson, deceased (see deposition of Andrew Simpson); and the complainant in his bill admits notice of these facts.]

That under these circumstances, the complainant on October 6, 1848, purchased of said Moore, the real estate aforesaid, and took a conveyance for the same; the consideration being \$1,600, \$1,300 of which he paid at the time, and gave his note for the residue of \$300 at three months, purposely making said note payable to Moore Simpson alone, and not to his order, and naming the consideration thereof as land sold, in order that he might ascertain whether the unpaid legacies aforesaid, were charges on the land, and to [448 protect himself in case said Moore failed to comply with a promise then made to relieve the land from said charges before January 1, 1849.

The bill further states (among other things not now material to be noticed), that said Moore had utterly failed to comply with his promise to satisfy said unpaid legacies, and that thereby the complainant was in great danger of suffering a serious loss, not only to the extent of said note for \$300, but for so much more as should be necessary to satisfy said unpaid legacies, in case the same were held to be charges on the land and he obliged to see to the application of the purchase money; for said Moore Simpson was insolvent, and unable to respond to a judgment against him, on the covenants in his deed. [This fact of insolvency of Moore Simpson, is admitted by the written agreement of the parties on file in this case.]

That said note had been assigned to Thomas Miller, and Joseph

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W. McCague, partners under the name of Miller & Co., who had brought suit thereon in the name of said Moore for their use against the complainant.

Bethiah Simpson, the widow of the testator, Andrew Simpson, deceased, and all the legatees named in the will, as well as Miller & Co., are made defendants to the bill, and all of them are required to set forth their claims, and an injunction is prayed to restrain Moore Simpson and Miller & Co. from prosecuting said suit at law, until the questions made by the bill were determined, and that on final hearing, in case said unpaid legacies were held to be charges on the land, and the complainant bound to see to the application of the purchase money, the said Moore Simpson should be compelled to remove said charges by a limited time, or in default thereof, that said injunction be made perpetual, or in case said legacies were held not to be charged on the land, then that the legatees be enjoined from proceeding against the same, and that the complainant be quieted in his title, etc.

To this bill Moore Simpson sets up in his answer (and establishes **449**] *by proof*), that the conveyance made by him to Clyde, though absolute on its face, was, in fact, a mortgage (so stipulated by a written paper contemporaneously executed), given to secure a loan of \$1,600 made by said Clyde to said Moore Simpson; the said note for \$300 being part of the \$1,600.

Moore Simpson also admits in his answer, that one moiety of Mrs. Hanson's legacy, and the whole of that due the heirs of John Simpson, deceased, are unpaid; but claims that the real estate devised to him by the will of his father was not charged with their payment.

Mrs. Hanson and her husband, and the several heirs of John Simpson, deceased, answer the bill and set up the facts as to the non-payment of their legacies, insist that the same were by said will made charges on the real estate devised to Moore Simpson, and that said Moore, on accepting said devise, became a trustee for the payment of the same; that Clyde purchased said real estate with full notice of the trust, and that he is bound to see to the application of the said purchase money, and that they are entitled to come on said real estate in said Clyde's hands and compel payment of their said legacies; and they ask the court for such decree as may be proper, etc.

On the 8th day of May, 1851, Bethiah Simpson, widow of said

Andrew Simpson, deceased, died, so that the second moiety of said legacies, made payable six months after her decease, would fall due November 8, 1851.

At the October term, 1851, of the court of common pleas, the death of the said Bethiah, and the date thereof, was suggested upon the record; and at the same term it was made to appear that on August 1, 1851 [the time stipulated for the repayment of the \$1,600 loan made by Clyde to Moore Simpson, as set up in the answer of said Moore], the said Moore had settled with said Clyde, and that Clyde had thereupon reconveyed said premises to said Moore; leaving no matter undetermined between them, except the question of costs. At the same time one *William Miller, father of [450 said Thomas Miller, and father-in-law of said Joseph McCague, announced to the court, that subsequently to the reconveyance of said estate by Clyde to Simpson, he had purchased the same of said Simpson and taken a conveyance therefor; but the court not regarding said announcement, proceeded to decree in substance that said Moore Simpson should pay said unpaid legacies by a given day, or in default thereof; that execution should issue against him; and if said execution were returned unsatisfied, then that said real estate should be sold for the satisfaction thereof. And that said Moore should pay the costs, etc.

From this decree, Moore Simpson and Miller & Co. appealed, and upon the coming of the cause into the higher court, Hanson and wife and the heirs of John Simpson, deceased, obtained leave to file further answers by way of amendment and supplement, setting forth that on said 1st day of August, 1851, the said Clyde had reconveyed the real estate described in his bill, to said Moore Simpson, who thereupon, on the same day, conveyed the same to one William Miller, by deed, etc.; that said William Miller, at the time of said conveyance, was aware of the pendency of said suit, and of all the matters in controversy therein; that he also knew that the debts of said Andrew Simpson, deceased, had long since been paid, and respondent's legacies were unpaid, and that said real estate is charged in said Miller's hands with the payment of said legacies.

They also set forth the death of Andrew Simpson's widow, on said May 8, 1851, and pray that their answers may be taken as cross-bills, that William Miller be made a defendant, that said answers prayed to be taken as cross-bills may be answered, but not

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under oath, and that on final hearing, the proper decree may be made, etc.

The cross-bills are answered, replications filed, and the cause is thus at issue.

[451] **Mr. Miller*, for *M. Simpson et al.*, cited authorities as follows, to the points below stated :

Lands specifically devised are not to stand chargeable with pecuniary legacies. 3 *Sugd. on Vend.* 139, 140; *Case v. Case*, 1 *Conn.* 284. To charge the estate with such legacies the intention must be "either expressly declared, or fairly and satisfactorily to be inferred from the language of the will." 2 *Jarman on Wills*, 509, note 1; *Wright v. Denn*, 10 *Wheat.* 204; 2 *Johns. Ch.* g22. From the use of such words as "after payment of debts and legacies," "my debts," etc., being first paid, the doctrine is that the debts in all such cases constitute, by implication, a charge on the real estate. 2 *Story's Eq. J.*, sec. 1246; 2 *Jarm.* 510-520; see 2 *Ves. jr.* 320-322 (note); 3 *Ib.* 740; 5 *Ib.* 361. A general direction to pay legacies does not charge the real estate. 2 *Johns. Ch.* 624; 10 *Wheat.* 204; 2 *Jarm.* 509, and note. In this case, the lands, by law as well as by the will, were subject to the debts, funeral expenses of the testator, and also charged with widow's support from the produce of the farm. If, then, the purchaser is bound to look to the application of the purchase money, he is at once involved in ascertaining the amount and payment of the debts, bound to see the money so applied that the widow shall receive her support, and bound to see that each minor grandchild, scattered through several states, duly receives his proper share of the legacy left to his ancestor, although the same are not to be paid, as in this case, for fourteen years. In such case the rule is invariable that the purchaser is not bound to see the money applied. 2 *Jarman*, 511 (margin); *Hill*, 363; 3 *Sugd. on Vend.* 99-104, secs. 20-24.

W. T. McClintock, for heirs of *John Simpson*, and *Hollis Hanson* and wife, cited authorities as follows :

That express words are not necessary to charge the real estate with payment of debts or legacies, the question being one of intention, which may be inferred. 2 *Jarm.* 512; 1 *Rop. Leg.* 452] *448; 2 *Binney*, 525; 6 *Ib.* 395; and the cases generally hereafter cited. That the words "after my debts and funeral charges are paid, I devise and bequeath as follows" (there being

nothing of contrary import in the will), charge the estate with the debts. 2 Story's Eq., sec. 1246; 2 Jarm. 512, *et seq.* That where both lands and personalty are devised to one son, who is directed to pay the portions of the others in money in lieu of the land, there is more than a charge on the personalty. Tower's appropriation, 9 Watts & Serg. 103. That these *unprovided* children are placed on the footing of creditors. Webb v. Webb, Bernard, 86, cited in 1 Rep. Leg. 452; Lypet v. Carter, 1 Ves. 499; Hassanclever v. Tucker, 2 Binney, 525; and cases there cited in argument for plaintiff in error; in this connection, *vide* the case of Darnman v. Rust et al., 6 Rand. 586. "That where the real estate is combined with the personal, *i. e.*, where they are made to constitute one entire fund, the former will be liable to all the burdens of the latter, and be charged with the debts and legacies." 1 Rep. on Leg. 450, chap. 12 cases cited; 1 Ves. jr. 444; Bench v. Biles, 4 Mad. 187; Kidney v. Consmaker, 1 Ves. jr. 436; 2 Ves. jr. 267; Hassanclever v. Tucker, 2 Binney, 525; Wetman v. Norton, 6 Bin. 395; McLanahan v. McLanahan, 1 Penn. 96; Bank v. Donaldson, 7 Watts & Serg. 407; Kelsey v. Deyo, 3 Cow. 133. That whenever the person directed to pay the debts or legacies is also the heir, or the devisee of the realty, then the realty is charged with the debts or legacies, unless there is some circumstance (as a particular fund, or the like, provided for the purpose) contained in the will repelling the idea of a charge on the realty. 2 Jarm., chap. 45, p. 509, and the cases therein cited, especially those on pp. 524-526, etc. That when the executor is directed to pay the legacies, the realty being devised to others, no charge is created; but when the executor is directed to pay, and he is also the heir or devisee of the realty, then the real estate is charged. 2 Jarm. 523. That the principle does not lie, as some *have supposed, in the fact of the devisee being the ex- [453] ecutor, except in so far as this necessarily includes the other fact, that the devisee is the same person who is directed to pay the legacies. 2 Story's Eq., sec. 1247a. That the principle that where the devisee is the only person who is directed to pay the legacies, the realty becomes charged with the payment, overrides the presumption of intention to pay out of the personalty, even though the direction is to the executor, *eo nomine*, and that upon this reasoning, the case of a devisee being directed to pay the legacies, though not named as executor, lies naked to the operation of the principle referred to. Morancy et al. v. Quarles et al., 1 McLean, 194; Mc-

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Lanahan v. McLanahan, 1 Penn. 96; Webb v. Webb, Barnard, 86; 1 Rep. on Leg. 453; and see Kelsey v. Deyo, 3 Cow. 133; Harris v. Fly, 7 Paige, 421; Alcock v. Sparhawk, 2 Verm. 228; Aubrey v. Middleton, 2 Eq. Cas. Abridg. 497; Cloudsley v. Pilham, 1 Verm. 411; Elliot v. Hancock, 2 Ib. 143; 2 Story's Eq. 494, note 2; Hassel v. Hassel, 2 Dickens, 527; Henvel v. Whitaker, 3 Russ. 343; Dover v. Gregory, 10 Sim. 393; Lamphier v. Despard, 1 Conn. & Law, 204. That the intent is to be gathered from the whole will. Hawley v. Northampton, 8 Mass. 3; Cook v. Holmes, 11 Mass. 528. That "in order to ascertain the intent, are to be considered, 1. The terms of the particular bequest in their natural and legal signification; 2. Other parts of the will; 3. The situation and circumstances of the testator, and the subject-matter of the particular bequest." Jarvis v. Butrick, 1 Met. 480-483; Morten v. Perry, 1 Ib. 446. That it being conceded, that upon the acceptance of the devise, Moore Simpson became *personally* charged (Cook v. Grant, 1 Paige, 407, and cases cited by counsel), it does not follow that the real estate was thereby exempted; on the contrary, in all the cases the charge on the real estate is recognized in addition to the charge on the person. Henvel v. Whitaker, Cook v. Grant, Darnman v. Rust, Harris v. Fly, *supra*.

454] *A conveyance by the devisee would pass the legal estate. He was a trustee. Hill on Trustees, 355. That purchaser was bound to see to the application of the purchase money. 2 Story's Eq. J. sec. 1127; 2 Sug. on Vend. & Pur. 36, 37, 38, 51, 52; Hill on Trustees, 363, note; 2 Sug. on Vend. & Pur., chap. 17, 305 (p. 840, at bottom), sec. 27; Watkins v. Cheeck, 2 Sim. & Sta. 199; Gardner v. Gardner, 3 Mason, 178; Wormley v. Wormley, 8 Wheat. 421; Darnman v. Rust, 6 Rand. 592, 593; Harris v. Fly, 7 Paige, 427.

RANNEY, J. In the present position of this case, the whole controversy arises upon the supplemental answers and cross-bills filed by the unpaid legatees, and the answer of William Miller and Moore Simpson thereto; and the whole depends upon the solution of two questions:

1. Are these legacies, by the will of Andrew Simpson, charged upon the lands devised to Moore Simpson?
2. If so, was Miller, the purchaser, bound to see that the purchase money paid by him, was properly applied in discharge of the lien?

The legatees undertake to establish such a charge; and, as it

stands admitted that Moore Simpson is wholly insolvent, it is evident that their only hope of obtaining payment, depends upon their success.

1. The will of Andrew Simpson was made in 1837, and was evidently executed under the mistaken belief that it took effect immediately and before his death. He lived until October, 1841, and his wife until May, 1851. Subject to the payment of his debts, funeral charges, and the support of himself and wife, he devised all his real and personal property to his son, Moore Simpson; and directed him to pay to each of his other surviving children, and the representatives of one deceased, about an equal sum of money; the one-half in six months after his own decease, and the other, in six months after the decease of his wife.

*Now, it is certainly clear that there is no *express* charge [455 of these several legacies upon the property devised; and equally so that it was competent for the testator to make them a charge or not, as he saw proper. But an express charge was not necessary. While the intention of the testator, ascertained from the language he has employed, and construed with reference to the subjects of his dispositions and the objects of his bounty (*Lessee of Worman v. Teagarden*, 2 Ohio St. 382), must, in this as in other cases, govern; such intention may be deduced, as a matter of inference or implication, from all the provisions of the will taken and considered together. And in cases like this, I apprehend the intention to be established is rather that of placing the devisee in certain relations to the property, or under certain obligations in respect to it, than an actual contemplation of all the legal consequences resulting from such relations, or of the manner of enforcing such obligations. These, the law annexes as a part of its own system of rules; and judicial decisions furnishing the highest evidence of these rules, are, in such cases, much safer guides than in most cases arising upon the construction of wills.

But the adjudged cases must be used with careful discrimination. The subject has been often considered from several different points of view, and with different objects; and the most numerous class of cases in England have been decided upon grounds so peculiar to their system of law as to make them of little value elsewhere.

By the common law, the real estate of a deceased debtor could never be reached by his simple contract creditors. The courts

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very early felt the injustice of this rule, and to counteract its effect where there was a deficiency of personal assets, seized upon the slightest indication of intention in the will of the testator, to charge such debts upon the realty. In giving effect to this policy, it was at first thought to be necessary that the testator should, be-456] fore devising the lands sought to be charged, have *directed his debts to be first paid; or paid out of his estate; or some equivalent expression to evince an intention not to give any thing until his debts were paid. But even this restriction was very soon disregarded, and such introductory words held to be unnecessary; and in *Graves v. Graves*, 8 Linn. 55, Sir L. Shadwell lays down the doctrine broadly, that wherever the testator, in any part of the will, directs his debts to be paid, it is, in effect, a direction that they shall be paid in the first instance; and, in case of a deficiency of personal property, charges them upon the realty. This decision has been followed in several later cases; and Mr. Jarman (2 Jarm. on Wills, 519) correctly states the established doctrine to be, that "a general direction to pay debts in whatever part of the will contained, operates to throw them on the testator's real estate." The better opinion is that it operates, not only against a devisee of the land, but also against the heir, and where the will is confined to a disposition of the personal estate. Sir R. P. Arden, in *Shalcross v. Finden*, 3 Ves. 739, said he was "very clearly of opinion, that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir at law* or devisee."

And, although the rule is subject to an established exception, where the testator has provided a specific fund for the payment of debts, yet this exception is confined within so narrow limits, that Lord Chancellor Lyndhurst, in *Price v. North*, 1 Turn. and Phill-85, where the testator had expressly bequeathed the residue of his personal estate, subject to the payment of debts and legacies, held the real estate charged as an auxiliary fund; observing, that courts of equity had always been desirous of sustaining such charges for the benefit of creditors, and that the presumption in their favor was not to be repelled by anything short of a clear and manifest intention to the contrary. Now, while this whole course of decision is professedly based upon the intention of the testator, as derived from 457] the language of the will, it is *impossible not to see that

the anxiety of the courts "to prevent men from sinning in their graves," by leaving their debts unpaid, or, for a more substantial reason, to prevent injustice to living creditors, has largely contributed to produce it, and that in very many cases, they have compelled the testator to do an act of justice, which he had very little thought himself of doing. In this state, where all debts constitute a paramount lien upon all the property of the testator, the direct question could never arise; and, as none of the considerations which have influenced these decisions can have any application to the question, whether pecuniary legacies should be charged upon real property devised, it is evident that these decisions would furnish very unsafe guides. The distinction has been taken by the English courts; Lord Macclesfield (in *Davis v. Gardner*, 2 P. W. 187) observing, in relation to lands descended, that, "as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir, which is a disinherison *pro tanto*;" and in *Shalcross v. Finden*, *supra*, there is said to be "no reason why a specific devise should not take effect as well as a pecuniary one." The fact is, that, after a considerable struggle to escape the imputation of inconsistency, it is pretty well settled that a clearer manifestation of intention is requisite to charge the realty with pecuniary legacies than with debts; and the decided weight of authority there, as well as the undivided opinion in this country, is that where it is not expressly done, the implication must be plainly and clearly deducible, from the language of the will, to have that effect. As is said by Mr. Jarman, "this distinction appears to have been a natural consequence of the extreme length which the courts had gone, in holding *debts* to be charged by loose and equivocal expressions." 2 Jarm. on Wills, 531. In principle, there is little room for doubt upon this subject.

There may be much force in ascribing to a testator the intention to pay his debts before he gives away any of his property—of being just before he is generous—but, as between the mere objects of his bounty, where he has given a pecuniary legacy, resting upon and payable from the personal fund, to one, and devised real estate to another, and the personal fund proves insufficient, there can be no reason for disappointing the devisee rather than the legatee, or for shifting the loss from him, upon whom the law has cast it, upon one that the law does not affect, until it is made unmistakably to appear that the testator so intended. Without such

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clear manifestation of intention, there is great danger of interfering with his wishes; and to derive it by implication, the language of the will ought to be so explicit as to leave no doubt in the mind of the court that the testator actually contemplated such a contingency, and intended to provide against it.

In all such cases, the question is, whether the estate devised shall bear a burden that the testator has not imposed upon the devisee; and the controversy always relates to the existence or non-existence of the obligation. To this class properly belongs the case of *Lupton v. Lupton*, 2 Johns. Ch. 614.

But none of these cases, either in form or substance, reach a case like the present, where the devisee is not only expressly charged with the payment of the legacies, but is also the recipient of all the testator's real and personal property. Looking at the value of the property devised and the relationship of the legatees, there is much reason for supposing that the testator adopted the method provided in his will, for the mere purpose of effecting an equal division of his estate. But we express no opinion upon the effect of this circumstance, or upon the further position taken, that the legatees, being unprovided children, are entitled to the same standing as creditors in the settlement of this question. In our opinion, the charge upon the property in this case, rests upon much more obvious considerations.

Numerous cases in England have settled the doctrine, that a bequest of legacies, followed by a gift of all the residue of the testator's real and personal property, operates to charge the 459] *entire property with the legacies. *Hassell v. Hassell*, 2 Dick. 526; *Burch v. Biles*, 4 Madd. 187; *Cole v. Turner*, 4 Russ. 376; *Mirehouse v. Scaife*, 2 Mil. and Craig, 695; 1 Ves. jr. 436; 2 Ib. 267.

The same doctrine has been often applied in the courts of our sister states. *McLanihan v. Wyant*, 1 Penn. 96; *Bank v. Donaldson*, 7 Watts & Serg.; *Kelsey v. Deyo*, 3 Cow. 133; *Adams v. Bracket*, 5 Met. 280; *Witman v. Norton*, 6 Bin. 395; *Downman v. Rust*, 6 Rand. 587.

And it has been adopted, in its fullest extent, by the Supreme Court of the United States, in the recent case of *Lewis v. Darling*, 16 How. 1; and, indeed, carried so far as to permit the legatee to subject the real estate in the first instance, without averring or proving a deficiency of personal assets. These cases certainly do

not, in terms, apply to the present, but they fail in application, simply because cases like this do not need the aid of the principle they enforce. They presuppose a bequest of pecuniary legacies, without any direction as to the person by whom, or the fund from which, they shall be paid, and a subsequent devise of the residue of real and personal property; and they are founded upon the irresistible implication arising, that the testator intended to give to the devisee only what remained after satisfying previous gifts, and intended to charge both kinds of property, as he has blended both in the disposition. In this case, both kinds are blended, and the gift is expressed to be of the residue, after payment of debts, funeral expenses, and the support of the widow; but surely the inference, that the testator intended to give only what remained after the payment of legacies, is perfectly clear, when he has imposed the payment upon the devisee, and has placed in his hands the only fund from which they could be paid.

And this brings us to the class of cases which do, in terms and principle, apply to, and conclusively govern, this; and they are those in which it has been uniformly held, that where the real *estate is devised to the person who is directed to pay the [460] legacy, such legacy is an equitable charge upon the property so devised, unless there is something in the will itself to indicate a contrary intention on the part of the testator; and this, even, although the devisee is also the executor, or is the residuary legatee of the personal estate. Without entering upon a particular examination of the English cases, it is sufficient to say that the doctrine is sustained by *Alcock v. Sparhawk*, 2 Vern. 228; *Aubrey v. Middleton*, 2 Eq. Cas. Abr. 497; *Cloudsley v. Pelham*, 1 Vern. 411; *Elliott v. Hancock*, 2 Id. 143; *Webb v. Webb*, Barn. Ch. 86; *Lypet v. Carter*, 1 Ves. Sr. 499; *Barker v. Duke of Devonshire*, 3 Meriv. 310;—and is so fully settled, as to justify Mr. Jarman in affirming that this circumstance “has *always* been held sufficient to charge the real estate.” 2 Jarm. on Wills, 533.

Among the cases in this country, that of *Harris v. Fly*, 7 Paige Ch. 421, is most expressive in point, and deserves special attention. The controversy arose between pecuniary legatees and a purchaser upon execution of the lands of the devisee. Nicholas Drum devised the lands to his son Aaron Drum, and also made him a residuary legatee. He then gave to each of his two daughters \$1,000, to be paid by his son, the devisee, in six equal annual payments.

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The chancellor held the legacies an equitable charge upon the real estate devised; and after a very satisfactory examination of the question, his conclusion is thus stated: "Upon a very full examination of the authorities, I am satisfied, that where real estate is devised upon condition to pay the legacy, or with a direction to the devisee to pay the legacy, in respect to the estate so devised to him, and because that real estate has thus been devised, such real estate is in equity chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption; or from which it can be inferred that the testator intended to exempt 461] the estate devised from that charge." See *also, *Tole v. Hardy*, 6 Cow. 333; and 1 McLean, 194. I have said that the course of decision upon this subject, has been uniform. I ought perhaps to except from the remark, the opinion expressed upon the constructions of the will of John Page, in the case of *Wright v. Denn*, 10 Wheat. 204. It was attempted in that case, to make the legacies a charge upon the land, for the purpose of enlarging a devise without words of limitation to an estate in fee simple. The settlement of the question had very little, if any influence upon the decision of the case; and it seems to have been done without full consideration, and without any allusion to the marked distinction between legacies which are not, and those which are, required to be paid by the devisee. In no event, could that case be received, to weaken the force of the general current of authority by which the doctrine is supported, or the strong reasons upon which it is founded.

In this case, Moore Simpson is directed to pay these legacies to the other children of the testator, in respect of the property devised to him, and because the testator has given him the property with which to pay them. No attempt is made to burden him with a doubtful liability. The liability is most positively and expressly imposed; and the only question is, *how shall it be secured?* Must the legatees trust to his personal responsibility, or have they a lien upon the property devised? The testator has not expressly said that they should have such lien, and it is difficult to find in the language of the will, any positive indication that he knew of, or intended to provide for it. But, in our opinion, this is not necessary. We are entirely satisfied that reason and justice, as well as the adjudged cases, mark a plain line of distinction, between cases where the property devised is sought to be reached by a legatee on failure

of the personal fund, or in exoneration of that fund, and cases where the devisee is required to pay the legacy, as a part consideration for the property. In the one case, it must appear to have been the intention of the testator to create the burden; and this intention *must be so clearly shown as to convince the court, that [462 he actually foresaw and contemplated the charge, and intended to provide for it. To declare the charge established, without such clear conviction, would be to encounter the hazard of doing injustice to the devisee, and defeating the wishes of the testator.

In the other, it is enough that the devisee stands charged with the payment of the legacy on account of the devise; and the law then attaches a lien upon the estate devised, unless it appears, with equal distinctness, that the testator intended to deprive the legatee of this security. This can do no possible injustice to the devisee, as he is required to pay no more than the testator has positively imposed, and he has voluntarily assumed; and it is very often necessary to prevent the grossest injustice to the legatees, and the greatest violence to the intention of the testator, by leaving them unpaid.

Indeed, it might not be difficult to place the lien upon much broader, although not more satisfactory, grounds. When Moore Simpson accepted the devise, and took possession of the estate, he became absolutely bound to pay these legacies, as a part of its purchase price. The testator intended he should have the property only upon paying so much of a consideration for it. If he had taken the title by deed, an undoubted equitable lien for these payments would have attached; and I am wholly unable to see how a doctrine resting upon the broad foundations of justice and conscience, and which will not permit one to keep the estate of another until the full consideration is paid (2 Story's Eq., sec. 1219), can be made to depend upon the manner in which the title is derived. But whether the lien in this case, might rest upon this doctrine or not, it derives a strong support from the analogy; and I think it very clear, that the actual knowledge and contemplation of such a lien by the testator, are no more important to its existence, than in the case of a vendor of real property.

2. The charge being established, there is very little difficulty *in disposing of the remaining question. It is certain, that [463 Moore Simpson was invested with power to sell the property devised; (8 Sim. 485; 4 Myl. & Cra. 264; 1 Kee. 559), and that no

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distinction is to be taken between estates devised in trust, or those only *charged* with the payment of debts or legacies. 2 Sugd. on Vend. 38; 2 Story's Eq., sec. 1127; 7 Ves. jr. 323. But, in either case, the general rule undoubtedly is, that wherever the trust or charge is of a defined and limited nature, the purchaser must himself see, that the purchase money is applied to the proper discharge of the trust; but wherever the trust is of a general and unlimited nature, he need not see to it. 2 Story's Eq., sec. 1129; 2 Sugd. on Vend. 32; Murray v. Ballou, 1 Johns. Ch. 566.

In the application of this rule it has been generally held that where the trust is created, or the charge imposed for the payment of a portion, a mortgage, legacies, or scheduled debts, which are definitely ascertained, and to be paid over immediately to the person entitled; the purchaser, in the view of a court of equity, is bound to see that the money is actually applied to their discharge before the estate is relieved from the burden. But where the trust is created, or the charge exists, for the payment of debts generally, or for the payment of debts and legacies, when an account of the debts necessarily precedes the payment of the legacies; or where the money is to be reinvested or otherwise applied by the trustee to purposes which require time, deliberation, and discretion on his part; the purchaser is relieved from such responsibility, and the *cestui que trusts* must look alone to the trustee.

I am aware that several eminent judges have been of opinion that a purchaser is in no case bound to see to the application of the purchase money where the deed or will has designated the person to receive it; and that a power to sell necessarily includes the incidental power to give a valid discharge for the purchase money; and 464] Mr. Powell has defended the same opinion, with *much ingenuity and force. 1 Pow. on Mort. 312. But the general course of decision has clearly been otherwise.

In this case the amount of the legacies, and the persons who receive them, are distinctly defined in the will; and they were entitled to payment as soon as the time fixed in the will arrived. There is probably nothing to relieve it from the operation of the general principle; but it does not need the aid of that principle. There never has been any difference of opinion that, if the purchaser knew that the sale involved a breach of trust, or that the money was not to be applied in payment of the debts or legacies charged upon the estate, he would be compelled to hold the property subject to the

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charge. 2 Sugd. on Vend. 39; Watkins v. Cheeck, 2 Sim. & Stu. 199; Wormley v. Wormley, 8 Wheat. 421; Gardner v. Gardner, 3 Mason, 178.

Now, at the time Miller made his purchase he was fully aware, not only in fact, but from the notice furnished by the *lis pendens*, that the legacies were not paid, and that no part of the money received from Clyde had been applied to that purpose. While he advanced his money to pay off Clyde, and denied the existence of any lien in favor of the legatees, he participated in the breach of trust, and after finding himself mistaken as to the lien, he stands upon no ground to insist that it has been discharged.

We are therefore of opinion that the property is still charged with the payment of these legacies, and shall decree accordingly.

JUDGE THURMAN, having been of counsel, did not sit.

LESSEE OF ADAM C. FORD v. HENRY LANGEL ET AL.

The grantee or heir of one protected from the operation of the statutory bar, is entitled to the full benefit of that protection, and may bring a suit within the same time, and to the same effect, as though no change of ownership had occurred, and the suit was prosecuted in the name and for the benefit of the original owner.

*An action can not be maintained, on the demise of husband and wife, [465 after the statute has run for the full period against the husband, while the coverture continues.

EJECTMENT; reserved in Fairfield county.

The case is sufficiently stated in the opinion of the court.

John T. Brazee, for plaintiff.

H. H. Hunter, for defendant.

RANNEY, J. It appears from the agreed statement of facts, upon which this cause is submitted to the court, that the lands in controversy were patented to the heirs of John Dodge, on the 12th of July, 1802. These heirs were five in number, one of whom, Theo-

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docia, married in 1812, and on the 23d of September, A. D. 1850, in connection with her husband, conveyed her undivided interest in the property to the lessor of the plaintiff. It is admitted that the defendant and those under whom he claims, have been in the exclusive and uninterrupted adverse occupancy of the premises for more than twenty-one years prior to this conveyance. The question is, does the act for the limitation of actions bar a recovery? On the part of the plaintiff, it is insisted that it does not, as the said Theodocia was, during all that period, a *feme covert*, and exempted from its operation. While the defendant's counsel admits that the statute did not run against her, he insists that the exception in that act affords only a personal privilege, and is only operative where she is a party to the action, and can not be set up by a grantee claiming under her. But if this objection should not prevail, he still further insists that such grantee can, in no event, stand upon better ground than would the husband and wife, if the suit were brought by them; and that in such case, the bar upon the husband's right of possession being perfect, no recovery could be had upon their joint demise—the husband during the coverture having the exclusive right of possession, and a recovery inuring to his sole benefit.

466] *Without going at length into the reasons which bring us to the conclusion, we are all of opinion, that the first of these positions is not well taken, and that the grantee or heir of one protected from the operation of the statutory bar, is entitled to the full benefit of that protection, and may bring a suit within the same time, and to the same effect, as though no change of ownership had occurred, and the suit was prosecuted in the name and for the benefit of the original owner. To hold otherwise, would be to deprive infants, insane persons, and *femes covert* of much of the benefit the statute was designed to afford, and would be utterly subversive of the well-established principle, that as against such persons, the statute does not begin to run, or to have any effect upon their interests, during the continuance of the disability. Such interests, therefore, pass to the heir or purchaser, wholly unaffected by any lapse of time that may have run, while the owner was without the provisions of the statute.

But in the case of Thompson's Lessee v. Green, we have stated our reasons fully for holding that an action can not be maintained,

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on the demise of husband and wife, after the statute has run for the full period against the husband, while the coverture continues. It would hardly be supposed that their grantee occupied a better position, and that case is, therefore, decisive of this.

Judgment must be entered for the defendant.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO,

DECEMBER TERM, 1855.

PRESENT:

HON. ALLEN G. THURMAN, CHIEF JUSTICE.		
HON. RUFUS P. RANNEY,	}	JUDGES.
HON. THOMAS W. BARTLEY,		
HON. JOSEPH R. SWAN,		
HON. WILLIAM KENNON,		

JACOB AULTFATHER v. THE STATE OF OHIO.

- An information upon section 4 of the act to provide against the evils resulting from the sale of intoxicating liquors, is defective if it does not show that the place where the liquor was sold, was a place of public resort. This fact is sufficiently shown if the place is described as either a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, because each of these names is used in the act, and each of them does, *ex vi termini*, import a place of public resort. But it is otherwise if the place is merely called a "room;" for, although that word is also used in the act, it does not, *ex vi termini*, describe a place of public resort, and that it is so must be averred.
- An information upon section 2 of the act, is insufficient if it does not aver that the seller knew the buyer was a minor.
- A complaint before a justice of the peace for a violation of section 4 *only*, does not authorize an information, in the probate court, upon any other section.

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WRIT of error to the probate court of Belmont county.

*The case sufficiently appears in the opinion of the court. [468

W. P. Simpson, for plaintiff in error.

McCook, attorney-general, for the state.

THURMAN, C. J. The plaintiff in error was convicted and sentenced, in the probate court of Belmont county, upon an information containing two counts; by the first of which he was charged as "the keeper of a room where intoxicating spirituous liquors were sold in violation of law," and by the second of which he was charged with selling intoxicating liquors to a minor. To reverse his sentence he prosecutes this writ of error, and, among other assignments, alleges that the information is defective in this, that the first count, which is upon section 4 of the act to provide against the evils resulting from the sale of intoxicating liquors, is insufficient because it does not aver that the "room" where the liquors were sold was a place of public resort; and that the second count, which is upon section 2 of the act, is defective, because it is not averred that the seller knew the buyer was a minor. And to this count it is further objected that the complaint before the justice of the peace, and upon which the plaintiff in error was recognized, was for a violation of section 4 of the act only.

The facts are as stated in these assignments; and as to the law, the first two objections are fully sustained by the decision in *Miller's case*, 3 Ohio St. 475; and the last objection is supported by the judgment in *Gates and Goodno's case*, 3 Ohio St. 293. From those decisions, pronounced after full argument and much consideration, we see no reason to depart, and consequently the judgment in this case must be reversed.

It may be proper however to add, lest the generality of the language used in *Miller's case* might lead to misapprehension, that the fact that the place where the liquor was sold was a place of public resort, is sufficiently averred if it is described as either a tavern, eating-house, bazaar, restaurant, grocery, or *coffee-house, [469 because each of these names is used in the act, and each of them does, *ex vi termini*, import a place of public resort. But it is otherwise if the place is merely called a "room;" for, although that name is also used in the act, it does not, *ex vi termini*, describe a place of public resort, and that it is so must be averred.

Judgment reversed.

S. D. HARRIS v. JOSEPH G. GEST.

RESERVED from the district court of Franklin county.

This was a motion to dismiss the appeal in the district court, upon the ground that the appeal bond was not filed "in thirty days from the rising of the court" of common pleas. The question is entirely as to what constituted the June Term, 1854, of the court of common pleas of Franklin county, Ohio. The facts are as follows: At the June Term of the court of common pleas, to wit, on 9th day of June, A. D. 1854, the plaintiff obtained a verdict against defendant for three hundred dollars, and thereupon judgment was entered upon the verdict and for costs. The defendant at that time gave notice of his intention to appeal. No other order was made in the case at that term.

On the 26th day of June, at same term, the following order was entered upon the journal: "Ordered that an additional and adjourned term of this court be held, commencing on the 5th day of July next, such additional and adjourned term being necessary for the purpose of completing the business now on the docket and unfinished for the want of time."

On the 26th day of June the following entry was made at the close of the day: "And thereupon the court adjourned until nine o'clock on the 5th day of July next." And on the 5th day of 470] *July, the following entry commences the day's proceedings: "Wednesday morning, July 5, A. D. 1854, court met pursuant to adjournment."

During the interval between June 26 and July 5, the court of common pleas was held in Madison county by the same judge that presided in the Franklin common pleas. The regular summer term thereof commenced on the 27th day of June, and ended by a *sine die* adjournment before the 1st day of July. Madison and Franklin are in the same subdivision.

On the 7th day of July, the following order was made on the journal of the court of common pleas of Franklin county, Ohio: "Ordered by the court that all causes on the docket in which decrees, orders or judgments have not been entered, and all motions, applications and petitions on file, and all other matters and things undisposed of, be continued until the next term."

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On the 10th day of July, the final entry on the journal as follows: "And the court adjourned *sine die*."

The defendant executed his undertaking for his appeal with good and sufficient sureties, which was approved and filed on the 2d day of August, A. D. 1854, within thirty days of the last adjournment, but more than thirty days after the first adjournment.

The law provides, 52 Ohio Laws 10, sec. 5: "That whenever the state of business in any of the courts of common pleas [in the 5th district] is such as to render it necessary, such court shall have power to appoint and hold an *additional* term for the purpose of completing the business of any regular term upon notice thereof being entered upon the journals."

Swayne & Baber, and *Galloway & Matthews*, in support of the motion to quash the appeal.

I. If the "additional and adjourned term" was a part and continuation of the term at which the judgment was entered, then the appeal bond was filed in time, otherwise not. Constitution, art. 4, sec. 3; 52 Ohio L. 10, sec. 5; Swan's new Stat. 107, sec. 2.

II. *If it was a mere continuation of the regular term, then, [471 in contemplation of law, the common pleas courts were in session in two counties of the same subdivision—Madison and Franklin—at the same time; which is not constitutional. Cons., art. 4, sec. 3. It follows, that the regular term in Franklin ended when the law required the term in Madison to begin. *Gregg v. Cook*, Peck, 82; *Garner v. Carral*, 7 Geyer, 365.

III. The language of the act is, "an *additional* term for the purpose of completing the business of any regular term." Nothing is said of an *adjourned* term. The use of the word "adjourned" in the order of the court, was from carelessness, or accident. The word is mere unmeaning surplusage. Now the order shows that the court was acting *under the statute*, for it limits the business to be done in July, as the statute limits the business of an additional term. Hence, as the statute contemplates a distinct term, the court must be held to have done so. The court has no power to so limit the business of any part of a *regular* term, whether held before or after an adjournment.

Henry C. Noble, against the motion.

I. We admit that "an additional term" is different from an ad-

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journd term; that an adjourned term is the continuance by adjournment of the same term. 5 Mass. 535. An additional term is an independent, separate term. If, therefore, the court find this "an additional term," the motion should be sustained; if "an adjourned term," or an adjournment of the June term, then should the motion be overruled.

II. We maintain that every court has the right to control its own sessions, unless expressly prohibited by law; and that in pursuance of that right they may adjourn not only from day to day, but from one day to a distant day specified.

In *The Mechanics' Bank of Alexandria v. Withers*, 6 Wheat. 106, C. J. Marshall says:

"The sole question in this case is whether the adjournment 472] *from the 16th of May until the fourth Monday in June was a continuation of the April term, or constituted a distinct term.

"There being nothing in any act of Congress which prevents the courts of the district *from exercising a power common to all courts, that of adjourning to a distant day*, the adjournment on the 16th day of May to the fourth Monday in June would be a continuance of the same term, unless a special act of Congress expressly enabling the courts of the district to hold adjourned sessions, may be supposed to vary the law of the case."

In that case the court decided that a law enabling the court to hold "*an adjourned session*" was simply an affirmation of the common-law power above mentioned, as an adjourned session meant "the same session with that at which the adjournment was made," and therefore did not affect the question.

III. That the order of June 26 was out of abundant caution, and not to appoint an additional term under the statute. That this is evident by the using of the words "and an adjourned term" to qualify the words additional term; and we infer this from the journal entry at the end of the 26th June and beginning of the 5th of July sittings; as, also, from the fact that the general order of continuance was not made until July 7.

IV. We think that the order entered on June 26 does not affect the general power of the court to adjourn its sessions for any length of time, by an adjournment to a fixed day, which it did, as appears by the journal entries.

V. The constitution, section 3, article 4, authorizes two sittings

at once in the district, and therefore in the same subdivision, if two sittings were held at once in Madison and Franklin counties.

THURMAN, C. J. The judges of the courts of common pleas are judges of their respective districts, and not of the mere subdivisions thereof. The subdivision of the districts is for election purposes merely. Const., art. 4, sec. 3.

There is nothing in the constitution that forbids the holding of *common pleas courts in different counties of a subdivision, [473 at the same time.

Courts are not limited, in their power of adjournment, to an adjournment from one day to the succeeding day. They have an inherent power to adjourn to a more distant day, when not restrained by the constitution or statute law; and there is no such restraint upon the common pleas courts in Ohio. 6 Wheat. 106. When this power is exercised, the sitting after the adjournment is a prolongation of the regular term, and, in contemplation of law, there is but one term. 6 Wheaton, *supra*. But the "additional term," provided for by section 5 of the act of January 31, 1854 (52 Ohio L. 10), is a distinct term, and not a prolongation of a regular term.

When the journal entries leave it doubtful whether it was intended to appoint an "additional term," under said section, or merely to adjourn the regular term to a distant day, the former construction ought to be preferred, since adjournments to a distant day are, in general, highly impolitic, and ought not, except for very weighty and special reasons, to take place. In this case, the limitation upon the business to be transacted at the July sitting, contained in the order appointing that sitting, shows that a distinct term, under the statute, was intended.

An appeal bond executed more than thirty days after the regular term at which judgment was rendered, but within thirty days after an "additional term," held under said statute, is not within the time required by law.

Appeal quashed.
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474] *THE CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD
COMPANY v. LEVI T. ELLIOTT.

IN error to the district court of Lorain county.

The object of the petition is to reverse a judgment recovered by Elliott against the company for killing his cattle. The facts and points in controversy, as they appear in the bill of exceptions, are as follows:

It appeared that, in 1852, the plaintiff was the owner of two oxen and some cows, and that the railroad of the defendants passed through the lands of the plaintiff in Lorain county; that part of said lands were not fenced; that there were other unfenced lands in that immediate vicinity; and that there was also a public highway in the immediate vicinity. It further appeared that the plaintiff was in the habit of allowing his oxen and cows to run on the highway and the unfenced lands adjoining and in the vicinity of said railroad. While they were thus running at large, in 1852, the locomotive of the express train from Cincinnati killed two of plaintiff's oxen which were upon the track, about four o'clock in the afternoon. It appeared that, before they were killed, the oxen were feeding with the cows by the side of the unfenced lands adjoining the railroad, near to the plaintiff's land; that when the engine was 80 to 100 yards from them the steam-whistle was blown. The cows and oxen ran along the roadway some considerable distance, and the whistle was blown continuously to scare them off. The train finally ran over and killed the oxen. Witnesses swore that no signal for putting down the brakes was heard, and that they believed the speed of the train was not slackened; and the plaintiff gave evidence tending to prove negligence upon the part of the defendants. The defendants asked the court to charge the jury that if they were satisfied that the plaintiff permitted his cattle to go at large on uninclosed grounds, other than the public highway, and adjacent to said railroad, and being permitted so to go at large on such uninclosed grounds, the cattle in question passed from such grounds onto the track of said railroad, and were then injured, such permission constituted such negligence on the part of the plaintiff in the premises as precludes him from a recovery in this case for the damage so sustained by

him in consequence of the negligence in the premises of the defendants, which charge the court refused to give, but charged the jury that the defendants were under no legal obligation to fence in their railroad, and their omission to do so did not constitute negligence on their part for which the plaintiff could recover in this action; that the plaintiff had a right to permit his cattle to run at large upon the public highway, and if he so permitted them to run at large, or permitted them to run at large on other uninclosed land adjoining the railroad of the defendants, and in consequence thereof they went upon the track of defendants' railroad, and were on said track at the time of the injury complained of, and plaintiff omitted to restrain them from going upon said track, the plaintiff was not thereby chargeable with negligence which would prevent him from recovering damages in this case, although the jury should find that the injury was not intentionally done by the defendants; that if the injury was the immediate consequence, in whole or in part, of the plaintiff's negligence, he could not recover of the defendants for any negligence on their part except gross negligence; that the question for the jury to determine was whether, under all the circumstances of the case, the defendants exercised reasonable and proper care in running their engine to avoid injury to the cattle of the plaintiff; that there was no rule of law that required the defendants to stop their engine or check its speed, to avoid injury to the cattle of the plaintiff, unless that was required to be done by the use of reasonable and proper care on their part; that in determining whether the defendants did use reasonable and proper care in this case *they should take into consideration all the circumstances of [476] the case, as well the conduct of the plaintiff in permitting, if he did so, his cattle to run at large and be upon the track of the defendants' road, as the nature and importance of the defendants' business, and the inconvenience and loss to which they might be subjected from having the progress of their trains obstructed by cattle upon the track of their road; and if, upon the whole case, they should be satisfied that, at the time of the injury in question, the defendants did use reasonable and proper care to avoid committing the injury, they must return a verdict for the defendants; but if they should find that the defendants did not exercise such reasonable and proper care, and thereby caused the injury com-

C., C. & C. R. R. Co. v. Elliott.

plained of, they must give the plaintiff a verdict, with such damages as they should think reasonable.

The jury having found for the plaintiff, the defendants moved for a new trial, upon the ground, and for the refusal to charge as requested, of error in the charge of the court; which motion being overruled, the defendants excepted.

The refusal to instruct the jury as requested, and the instructions given, are assigned for error.

Bishop, Backus & Noble, and *A. D. Clark*, for plaintiff in error.
S. Burke, for defendant in error.

THURMAN, C. J. The common-law doctrine that requires the owner of domestic animals, not unruly or dangerous, to keep them upon his own premises, and makes him a trespasser if he suffer them to run at large, and they go upon the uninclosed lands of another, is not the law of Ohio, being inconsistent with our statute law, and contrary to the common usage that has always prevailed in this state.

The remote negligence of the plaintiff will not prevent his recovering for an injury to his property *immediately* caused by 477] *the negligence of the defendant. The negligence of the plaintiff that defeats a recovery must be a *proximate* cause of the injury.

Suffering domestic animals to run at large, by means whereof they stray upon an uninclosed railway track, where they are killed by a train, is not, in general, a *proximate* cause of the loss; and hence, although there may have been some negligence in the owner's permitting the animals to go at large, such negligence being only a *remote* cause of the loss, it will not prevent his recovering, from the railroad company, the value of the animals, if the *immediate* cause of their death was negligence of the company's servants in conducting the train.

The bare fact that a railway is uninclosed, there being no statute requiring it to be fenced, does not, in general, render the railroad company liable to pay for animals straying upon the track and killed by a train—such want of fencing being, in general, only a *remote* cause of the loss.

The paramount duty of a conductor of a train, is to watch over the safety of the persons and property in his charge; subject to

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which, it is his duty to use reasonable care to avoid unnecessary injury to animals straying upon the road.

See *Kerwhacker v. The C., C. & C. R. R. Co.*, 3 Ohio St. 172; *The C., H. & D. R. R. Co. v. Waterson and Kirk*, *ante*; *Trow v. The Vermont Central R. R. Co.*, 24 Vt. 487.

Judgment affirmed.

CHEADLE v. THE STATE.

On the trial of an information for selling spirituous liquors not inspected, the state is bound to give some evidence in support of the negative averment. It is error to charge the jury, "that the state is not required to prove that the liquor was not inspected; that, on the state's proving a sale, the defendant is required to prove that the liquor was inspected."

*ERROR to the probate court of Morgan county. [478]

The facts of the case and the questions involved are fully stated in the opinion of the court.

John E. Hanna, for plaintiff in error.

H. S. Robinson (prosecuting attorney), and attorney-general, for the state.

RANNEY, J. The plaintiff in error was prosecuted, under section 1 of the act of May 1, 1854, "to prevent the adulteration of alcoholic liquors" (Swan's Rev. Stat. 479a), for selling a quantity of spirituous liquors which had not been inspected. The information contained the necessary negative averment, and the only question presented is, whether the state was bound to offer any proof in its support. The court below held that it was not; that upon proof of a sale, the burden was cast upon the accused to show that the liquor had been inspected. The question is not without difficulty, but upon careful consideration, a majority of the court are of opinion that the court erred in this ruling.

It is perfectly well settled, that the indictment or information must, in all cases, contain the negative averment; and there is no doubt, as a general rule, that some proof must be given to sustain it, where the round of action rests upon such negative allegation;

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or where the statute, in describing the offense, contains such negative matter; and where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise. 1 Greenl. Ev., secs. 78-80; 3 East, 192; 3 Bos. & Pul. 302; 19 I. R. 345; 2 Camp. 654; 2 Pick. 139, 4 Ib. 341.

These rules, however, are subject to an established exception, where the subject-matter of the negative averment lies peculiarly within the knowledge of the defendant, can be readily and easily 479] *proved by him, and can not, without great inconvenience, be proved by the party making the averment. 1 Greenl. Ev., sec. 80.

The adjudged cases have, for the most part, confined this exception to civil or criminal prosecutions, for a penalty for doing an act which the statutes do not permit to be done by any persons except those duly licensed therefor, and have applied it to the averment alleging the want of such qualification. It had its origin in prosecutions under the English game laws, but has since been extended to prosecutions for selling liquor, exercising trades, etc., without license, and the like cases.

But even in these cases, all the conditions to which we have alluded must exist, or the exception does not apply. As stated by Chief-Justice Shaw, in *Commonwealth v. Thurlow*, 24 Pick. 374, the proof is dispensed with only "from necessity, or that great difficulty amounting practically to such necessity; or, in other words, where one party could not show the negative, and where the other could with perfect ease show the affirmative." And accordingly in that case, which was a prosecution for selling spirituous liquors without license, it was held that the government must prove the negative averment, that the accused was not licensed—the county commissioners being required to keep a record of licenses granted—and the proof being thus equally accessible to each of the parties.

In this case the negative matter is inseparably connected with the statutory description of the offense; the prosecution is grounded upon it, and the negative allegation charges a criminal neglect of duty, punished with great severity. It does not refer to acts allowed to be done by those licensed therefor, and denied to others; but to a matter prohibited alike to all. It is not a question of personal qualification, but of the infraction of a general criminal prohibition, by engaging in a traffic denied to everybody.

In our opinion the offense must not only be charged, but also

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proved, before the penalties provided by the statute can be *in- [480
flicted. It may be difficult for the state to make the proof; but, while that consideration should have great weight in determining the policy of creating offenses which can not be easily proved, it can furnish no good reason for convicting without it. We can not stretch this exception to a salutary rule of evidence so far as to cover a case like the present; or rebut the presumption of innocence upon a mere charge of guilt. In many cases it would be very difficult for the defendant to prove that the liquor had been inspected. The law contemplates the inspection upon its importation or manufacture, and requires no further inspection before a sale by those who have purchased of the importer or manufacturer. In no case does such a vendor of the article, have any evidence that he can produce that it has been inspected, short of going to the person of whom he purchased. It may be admitted that he could more readily find the witness than the officers of the state, without bringing the case within the principle upon which proof of the negative averment has been dispensed with.

Thus, in *Commonwealth v. Samuel*, 2 Pick. 103, which was a prosecution for peddling goods not being of the produce or manufacture of the United States, it was held that it was incumbent upon the government to prove affirmatively that the goods were of foreign produce or manufacture; although it is evident that no one could as readily have found the proof as the accused.

The rule does not depend upon a mere balancing of difficulties, and it is never applied unless the proof is practically beyond the reach of the government, and clearly within the power of the accused.

The judgment is reversed, and the cause remanded for further proceedings.

JUDGE SWAN dissented.
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481] *JOHN CHAPMAN v. WEIMER AND STEINBACHER.

A chattel mortgage, purporting to create a lien on the stock in a grocery, and also on such as should be subsequently acquired by the mortgagor, creates no lien on the subsequently acquired property.

When such mortgage authorizes the mortgagee to take possession of the property secured and attempted to be secured, it is a continuing executory contract; and when the mortgagor acquires such property after the execution of the mortgage, and actually delivers the same to the mortgagee, the latter thereby acquires a valid lien on such subsequently acquired property.

PETITION in error, filed by leave in this court, to reverse a judgment of the district court of Summit county.

The case is sufficiently stated in the opinion of the court.

Wolcott & Upson, for plaintiff in error.

I. There being no ground to question the entire good faith of Chapman, both in taking the mortgage, and the subsequent possession of the goods, the case is simply that of two innocent creditors, each striving for priority over the other.

II. The questions whether the mortgage was or was not void as to judgment creditors having levied before Chapman's possession, and prior purchasers, because of Marvin's remaining in possession with implied power of sale, or whether the mortgage would or would not *per se*, cover after-acquired property, are wholly beside the case.

III. Chapman's right to the possession of the property in controversy, rests not upon the mortgage alone or chiefly, but on that coupled with his subsequent possession, or it may stand firmly independent of the mortgage.

IV. The following propositions, settled by an uniform current of authorities, and founded on principles which command universal acquiescence, establish Chapman's right on grounds not to be shaken.

482] *V. Though a mortgage of chattels, where the mortgagor retains possession with power of sale, is void as against execution creditors and subsequent purchasers, yet it is good as between the

parties. *Collins v. Myers*, 16 Ohio, 547; *Brown v. Webb*, 20 Ohio, 389, and the reports *passim*.

VI. Whenever possession is taken under such mortgage from that time it becomes valid so as to protect the property from judgment creditors who have not levied, and subsequent purchasers. This precise point was settled in *Brown v. Webb*, 20 Ohio, 389.

VII. A stipulation in a mortgage that future-acquired property shall be holden as security for the mortgage debt, is an executory agreement binding the parties, and under it the creditor may take the property into his possession, and hold it for his security when it is acquired by his debtor. Whenever the creditor does so take it into possession before it has been levied on or sold, he may under the executory agreement hold it against all persons. 13 Met. 33.

VIII. The executory agreement of the owner in such case, is a continuing agreement, so that, when the creditor does take possession under it, he acts lawfully under the agreement, of one then having the disposing power, and this makes the lien good. *Moody v. Wright*, 13 Met. 33.

IX. Even though the mortgage *per se*, might not cover subsequent additions to the stock, and though Chapman at the time claimed his right under the mortgage alone, yet if he took possession with Marvin's consent, for the purpose of securing his debt, that would operate as a new pledge or mortgage effectual against all persons but prior purchasers and creditors with levy. *Rowley v. Rice*, 11 Met. 333.

X. But Chapman's right to the goods in question does not depend on the validity of the mortgage. If it be void, then Marvin, on December 18, 1852, had the absolute disposing power of the property against all persons. In the exercise of *this power [483 he did, on that day, and before the rights of any creditors had attached, deliver them in good faith to Chapman, either by way (as the heading of the invoice would seem to imply) of absolute payment to the extent of their value of his indebtedness to Chapman, or to hold as security for the payment thereof. In the former case it is a sale, and of course is beyond question. In the latter case it is a pledge or hypothecation of the common law accompanied by possession, and is equally beyond question. 2 Kent Comm. 577;

Chapman v. Weimer and Steinbacher.

Story on Bail. 291 ; 5 Johns. 261 ; 24 Wend. 117 ; 2 Hill on Mort. 343, 344.

In any aspect of the case Chapman's right to the property and its possession would seem to be unimpeachable, and the judgment should be affirmed.

Edward Oviatt, for defendants in error.

KENNON, J. Chapman, the plaintiff in error, brought an action of replevin against Weimer and Steinbacher, before a justice of the peace, for some goods of the value of about \$90, and had a judgment in his favor. The case was appealed by the defendants to the court of common pleas, and then submitted to the court upon the facts, and judgment again rendered in favor of Chapman.

The defendants took the case, by petition in error, to the district court of Summit county, and the judgment of the common pleas was reversed and a new trial ordered. The present proceeding is a petition in error, filed in this court, for the purpose of reversing the judgment of the district court.

Upon the trial of the case in the common pleas, the court found in favor of Chapman, and a motion was made for a new trial which was overruled by that court, and judgment rendered. A bill of exceptions was tendered to the court and signed by the judge, from which it appears "that Ira M. Trussell, being owner of a stock of 484] groceries in 1852, sold them to Z. H. Marvin, for *\$674.73; that of this sum, \$500 was paid in cash to Trussell, and for the residue, of \$174.73, Marvin gave his note, with Chapman as surety, payable in one year, with interest; that the cash payment was made with money borrowed by Marvin from Chapman, the petitioner, and for which Marvin gave his note to Chapman, payable on demand; that on the 2d of October, 1852, Marvin (who was the stepson of Chapman) executed a chattle mortgage, or bill of sale, of his then stock of goods, with its *future increase and additions*, to secure the payment of the \$500 note, and to indemnify Chapman against his liability as surety on the note to Trussell."

There was a clause in this mortgage authorizing Chapman to take possession of the stock of goods and all he might thereafter have, whenever Chapman might see proper, and to sell and dispose of the same. This mortgage was duly filed the 5th of October, 1852.

On Friday, the 17th of October, 1852, Weimer and Steinbacher sold the property in controversy to Marvin, on credit, and delivered it

to him the same day. The goods thus sold were of the value of about \$90, and were by Marvin taken into his grocery.

On Saturday, the 18th of December, 1852, Chapman went into Marvin's grocery and demanded of him payment of the \$500 note to him. Marvin declared his inability to pay. Chapman then said to him that the business had not been going to suit him, and he would have to take charge of it himself. To which Marvin replied, "Very well, go ahead," and turned round and left the grocery, and did not return until the next day. Chapman remained in the grocery, and, on the 19th commenced taking an invoice of the goods, Marvin being present and aiding in taking the invoice, which was not finished until Monday, December 20, 1852. The particular goods in question were invoiced on the 19th of December. It does not appear that Chapman had any knowledge of the purchase of the goods from Weimer and Steinbacher, *until they were [485 reached in taking the invoice on the 19th, the day after Chapman had taken possession.

On the 20th, and, as we understand the facts of the case, before the invoice was fully completed, Marvin told Weimer and Steinbacher they might take the goods, and went before a justice of the peace and confessed judgment for the amount due, then being about \$90, and they caused the goods to be levied on by a constable to satisfy their judgment; and Chapman afterward replevied these goods.

It was claimed before the court of common pleas by the defendants in error, that a new trial ought to be granted, upon the ground that the bill of sale, or chattel mortgage, gave to Chapman no lien on the goods, the title to which was acquired by Chapman after the execution of the mortgage; and that such mortgages are void, at least as against creditors and purchasers, so far as the *subsequently acquired property* is concerned.

This mortgage not only undertakes to convey to Chapman the goods then on hand, but all the goods that Marvin might *thereafter* acquire; and it authorizes Chapman at any time thereafter, when he might see proper to do so, to take possession of not only the goods then owned by Marvin, but those which he might *subsequently* own.

It may be safely said that Chapman did not, by the mere execution of this mortgage, acquire any legal title to, or lien on, such subsequently acquired property. But when, after the execution of

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the mortgage, and after the mortgagor had acquired title to property not owned by him, nor in his power to deliver, at the time of the execution of the mortgage, he does acquire the title and possession of such property, and actually *delivers* the same to the mortgagee, a very different question arises.

In the case of *Moody v. Wright*, 13 Met. 17, Justice Dewey, in treating this subject, says: "A stipulation that future acquired property shall be holden as security for some present engagement, is an *executory* agreement of such a character that the creditor 486] *with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation, such creditor, under his executory agreement, may hold the same; but until such an act be done by him, he has no title to the same; and that such act being done, and the possession thus acquired (the executory agreement of the debtor authorizing it), it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner in such case is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully, under the agreement of one having the disposing power; and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, or to subsequently acquired property, an attachment or assignment takes place, the opportunity for completing the lien is lost."

The judge delivering this opinion is speaking of a duly recorded mortgage of personal property, and clearly expresses the opinion that the mortgagee may himself take possession of the newly acquired property, and thereby acquire a valid lien under his mortgage, without having the property actually delivered to him by the mortgagor. It is not necessary in the case under consideration to carry the doctrine to that extent, for we think that the court of common pleas was well warranted, from the evidence in this case, in finding that the property in controversy was actually delivered to the mortgagee by the mortgagor, and that he had entire possession and control of the property before the invoice was completed or the levy made. It is not like the case of a sale of property, where the amount and value has to be ascertained before the sale is complete, but is an agreement, a *continuing executory agreement*, to deliver the

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whole; and although the mortgagor had a right to be present, for the purpose of making, or seeing made, the inventory of the goods, yet, when *the mortgagee demanded the goods in the grocery, [487 and the mortgagor, in pursuance of the stipulation in the agreement, said to him, "Very well, go ahead," and left the grocery, he in substance said take possession, and it amounted to an actual delivery, as the mortgagee did then take possession.

We are aware that Marvin states, in his deposition, that he considered he had still a right to give the goods to the defendants; but this was nothing more than the expression of an opinion, in which, we think, he mistook his rights.

It is claimed, however, that Chapman obtained the possession of these goods by force from Marvin, and that he knew that Marvin had but lately acquired title to them and had not paid the defendants. This may be all true, but there is very little if any evidence tending to establish any such facts, and we can not say, therefore, that the court of common pleas erred in not granting a new trial for such reasons.

Upon the whole, therefore, we think the common pleas did not err in refusing to grant a new trial, and that the district court did err in reversing the judgment of the common pleas.

The judgment of the district court is therefore reversed, with costs, and the judgment of the common pleas affirmed.

WOODWORTH v. THE STATE.

An information founded upon section 1 of the act to prevent the adulteration of alcoholic liquors (Swan's Rev. Stat. 479a), must contain the general allegation, that the liquors sold were not inspected.

It is not sufficient to aver that they were not inspected in the county where sold, and that the cask containing them did not have the inspector's brand of any other county.

ERROR to the probate court of Ashtabula county.

*The fourth count of the information upon which the [488 plaintiff in error was convicted, was as follows:

And the prosecuting attorney aforesaid, in the name and by the

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authority of the State of Ohio, further gives said court to understand and be informed that said Elijah Woodworth, late of the township of Conneaut in the county aforesaid, on the ninth day of June, in the year of our Lord, one thousand eight hundred and fifty-four, in the township of Conneaut, in the county aforesaid, did unlawfully sell to one Samuel Fox, spirituous and intoxicating liquors of the kind commonly called whisky, the same not having been then and there inspected by the inspector of alcoholic liquors within and for the said county of Ashtabula, and the same not having then and there the inspector's brand of any other county in this state upon the cask containing the same, contrary, etc.

Farmer & Sherman, for plaintiff in error.

Attorney-General, for the State.

RANNEY, J. We shall notice but one of the errors assigned, as that, in the opinion of the court, is fatal to the fourth count of the information, upon which the plaintiff in error was convicted. That count charges him with having sold spirituous and intoxicating liquors "not having been inspected by the inspector of alcoholic liquors for Ashtabula county, and not having the inspector's brand of any other county in this state upon the cask containing the same."

The first section of the statute upon which the information is founded (Swan's Rev. Stat. 479a), punishes, with fine and imprisonment, the selling or offering to sell, "any spirituous or intoxicating liquors, not inspected as hereinafter provided." The second section makes it the duty of the inspector to inspect all alcoholic liquors *imported into or manufactured in the county*, unless they have the in-
489] spector's brand of some other county, *which is made evidence of the purity of the article. The first section defines the offense, and the second simply prescribes the duties of the inspector. The law contemplates the inspection of the article upon its importation into any county, or when it is manufactured, and before it is offered for sale. It was never intended to compel a second inspection, when the bulk was broken, and it was sold in one county and taken to another. A single inspection is all that is required, and it is entirely immaterial in what county it is made. It should, therefore, be averred that it was not inspected; and not simply, that it was not inspected in the county where it is sold, and that the cask

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from which it was taken did not have the inspector's brand of any other county. It is entirely consistent with such an averment, that the liquor may have been inspected in another county, into which it was imported or where it was manufactured, and was there taken from a cask properly branded and put into another, which was carried by the accused into Ashtabula county, and the liquor there sold. In such case, no crime would have been committed, and yet the information does not negative the existence of such a state of facts.

The judgment must be reversed.

MORRIS SOVEREIGN v. THE STATE OF OHIO.

To authorize a judgment for costs against a prosecuting witness, under the provisions of section 45 of the probate court code, the person accused must have been acquitted either by the probate judge or by a jury of twelve men.

THIS is a petition in error, praying a reversal of a judgment of the district court of Muskingum county, etc. The case is stated in the opinion of the court.

**Thomas M. Drake*, for petitioner.

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McCook, attorney-general, for the state.

THURMAN, C. J. The facts as shown by the record are these: December 30, 1853, the petitioner, Morris Sovereign, made an affidavit before a justice of the peace of Muskingum county, charging one Catharine Grawford with larceny; upon which a warrant issued, and she was arrested, and, after a hearing, recognized to appear in the probate court of that county, to answer the charge. The prosecuting attorney filed an information, which Sovereign indorsed as follows: "I hereby acknowledge myself to be security for costs in this case, in the event of the failure of the state in this prosecution; and I do hereby undertake to pay whatever costs may accrue herein, in such event, to the state. February 1, 1854.

(Signed)

"M. SOVEREIGN."

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February 6, 1854, the prisoner, being arraigned, pleaded "Not guilty," and demanded a trial by jury; whereupon a jury of six men were impaneled, who, after hearing the case, returned a verdict of "not guilty;" and, thereupon, she was discharged by the court. "And it further appearing to the court that the prosecution was malicious and without probable cause, it was thereupon by the court ordered that the prosecutor, Morris Sovereign, pay the costs of the proceeding, taxed at forty-five dollars and thirty-four cents."

The court of common pleas, upon error, affirmed this judgment against Sovereign, with costs; and the district court, upon error, affirmed the judgment of affirmance, with costs.

To reverse these several judgments against him, he now exhibits the present petition.

It is not pretended that the judgment complained of derives any support from Sovereign's indorsement upon the information. No statute has been pointed out, nor have we discovered any, author-
491] izing that indorsement; but if there were such a statute, *it would not avail the defendant in error, because, first, the judgment is not upon the indorsement; and, secondly, we find no jurisdiction conferred upon the probate court to render a judgment, much less a summary one, upon any such instrument.

The judgment was rendered in supposed compliance with the provisions of the 45th section of the probate court code, which reads as follows:

"When the defendant is acquitted, either by the probate judge or by a jury, he shall be immediately discharged; and if the probate judge certify in his minutes that the prosecution was malicious or without probable cause, he may order the prosecutor to pay the costs of the proceedings, and enter up judgment therefor, which may be enforced by execution."

With the policy of this law we, as a court, have nothing to do: but speaking for myself alone, I can not help remarking that it seems strange to me, that, in this humane and civilized age, our statutes create a direct pecuniary interest in the clerks and sheriffs who draw our juries, and by the latter of whom vacancies are filled with bystanders, and also in the worst class of prosecuting witnesses, namely, those suspected of malicious motives, to convict persons accused of crime. To make the fees of clerks and sheriffs depend upon the conviction of the prisoner, and to increase

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the zeal of a prosecuting witness by threatening him with a judgment for the costs if there is a verdict for acquittal, has always appeared to me a strange mode of securing that impartial trial which both justice and the constitution imperatively require. Nor have I been able to see that it is entirely consistent with the dignity of the state or the dictates of sound public polity, to carry on doubtful prosecutions at individual expense, and, because the state is indemnified from a paltry sum of costs, to place a citizen upon trial who would otherwise be suffered to go unmolested.

The argument of the plaintiff in error is, that Catharine Crawford was not acquitted by either the probate judge or a jury, and consequently the court had no authority to render a judgment against him.

*That she was not acquitted, within the meaning of the [492 act, by the judge, is very evident; and that she was not acquitted by such a jury as the constitution contemplates, to wit, a jury of twelve men, is decided by Work's case, 2 Ohio St. 296. In that case, it was held that the act under consideration, "in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void;" and that the probate court, before the passage of the amendatory act of April 26, 1854 (Swan's Stat. 753b), had no power to impanel a jury of twelve in a criminal case, is very apparent. The constitution secures the right of trial by such a jury, but does not execute itself; and no power could be derived by the court from the common law, because "our courts have no common-law jurisdiction in criminal cases." *Winer v. The State*, 10 Ohio, 345. It follows, that there was no law in force when Catharine Crawford was tried, providing a constitutional jury to try her case.

But this, says Mr. Attorney-General, was a defect of which she alone had a right to complain, and if she waived her privilege, Sovereign, who is within the letter of the statute, can not insist upon it. The statute provided for her trial by six men, and upon their verdict of acquittal, authorized a judgment for costs against him, if the prosecution was malicious or without palpable cause.

To this reasoning we can not assent. For myself, if the decision turned upon the question whether there was a waiver by the accused, I should hesitate a long time before answering that question in the affirmative. I do not clearly see how a prisoner can be said to have waived a trial by a jury of twelve, when no law had pro-

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vided such a jury. But it is unnecessary to decide this question, for in our judgment, this case does not depend on it. It is sufficient, in our opinion, that the legislature intended to provide a constitutional tribunal for the trial of offenses, and as incident to a trial by such a tribunal, to authorize in certain cases a judgment for costs against the prosecuting witnesses. But failing in their main 493] purpose—the tribunal provided not being a *compliance with the constitution—the incident, or minor purpose fails too. It sometimes happened that a clause in an act has been adjudged unconstitutional and therefore void, without affecting the remainder of the act; but in no case, I imagine, has a provision wholly dependent upon the constitutional clause, been held to remain unaffected.

Catharine Crawford could not have been lawfully convicted by a jury of six, had she seen fit to object to that tribunal; and possibly she could not whether she objected or not, no provision having been made for a constitutional jury. Shall we hold, that although she could not be thus convicted against her will, yet her acquittal by such a jury shall condemn a witness to a judgment for the costs? Were we to do so, the strange anomaly would be presented, of a law under which a witness could by no possibility convict the accused, and might yet have to pay the costs in case of an acquittal.

The judgment of the district court must be reversed, and proceeding to render such judgment as that court ought to have rendered, we also reverse the judgments of the common pleas and probate courts.

JOHNES v. THE AUDITOR OF STATE.

MANDAMUS. Leave given to amend the writ of mandamus in ten days, and to answer the amended writ in ten days thereafter.

THURMAN, C. J., remarked upon granting the above leave, that he would state for the information of the bar generally, that it must not be expected that the clerk of the court would draft writs of mandamus. By the express provisions of the code, the writ and 494] the answer thereto are pleadings, and the only pleadings *in
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the case. The petition, or motion, upon which the writ issues, is no part of the pleadings. The writ must therefore be sufficient *in itself* to show precisely *what is claimed* and the *facts upon which the claim is made*. To draft such a writ generally requires time and legal skill, and also a knowledge of the case which the clerk can not be required to obtain. Counsel must therefore prepare such writs and submit them to the court before they are issued, in order that it may be seen that they correspond with the order of allowance.

JONAS SHAVER v. JOSEPH STARRETT.

The statutory provisions authorizing the establishment of township roads, do not contravene the constitutional provision that "private property shall ever be held inviolate, but subservient to the public welfare."

A township road is as subject to public travel, and as free and open to every individual, as any other road in the state.

But the statute is fatally defective in this, that it makes no provision for a jury, in the proper sense of the term, to assess the damages of the property holder. *Lamb and McKee v. Lane*, affirmed.

ERROR to the court of common pleas of Muskingum county.
The case is sufficiently stated in the opinion of the court.

Jewett & O'Neil, for plaintiff in error:

This question must be decided by the construction to be given to one, or both, of two provisions of the constitution of 1851—article I, section 19, article XIII, section 5.

The first of these sections may be safely divided. It contemplates two classes of cases; and whilst it seeks to secure a compensation to the owner of the property taken in both, it recognizes *a [495] difference between property taken for *purely public* purposes, and property taken for purposes *partially public*. In the first it leaves the question with the legislature to determine how the compensation shall be assessed, secured, or paid; in the second it provides expressly that such compensation shall *first* be assessed by a jury, and *first* paid or secured.

There is no doubt about the right to appropriate private property to the public use, and of the power of the legislature in the absence of any constitutional provision to direct the mode and manner of making compensation to the owner. Such has been the practice in this state and everywhere else.

There is nothing in the nature of the case itself that requires a jury; it has never been so treated or considered, and surely we are safe in concluding that in the *absence* of the provisions of the constitution, which we have quoted, no question of this kind could have arisen. Do these provisions then require, that in a case like this, compensation should be assessed by a jury of *twelve* men?

"When taken in time of war," when taken *"for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money."* Thus far this section is complete, both as to a class of cases in which the public, as such, is alone interested, and from which no individual is to be benefited to the exclusion of another; it is complete also as to the remedy, providing that compensation shall be made, but leaving it to the wisdom of the legislature to determine how it should be assessed, and when paid or secured. The section then goes on and provides for another and the remaining class of cases, having no other connection with the previous division of the section than to exclude therefrom the benefit of its provisions. And as to this remaining class, it is provided and required that the compensation shall be assessed by a jury, and shall be *first* paid, or *first* secured. Considered separately, they are harmonious; but make 496] the provision of the *one apply to the other, and they are incongruous. If a jury is required in the first class of cases, upon the same reasoning compensation must first be made or secured, and thus the object of the first clause of the section is entirely destroyed.

If in error in this view of the first of these sections, we claim that the second sustains the construction given to it by the legislature in the passage of the law in question. A jury is any number of persons designated by the law to determine difficulties between parties. In civil it is not as in criminal proceedings. In the former there has been no uniformity in the number required to try questions of this kind. In some instances they are entirely withdrawn. In others they vary in number depending upon the

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character of the case, and the amount involved, always being subject to the law-making power of the country in which the question may arise. Not so in the latter. A jury to try crime has always been regarded and understood as consisting of twelve men. When, therefore, the constitutional convention provided that compensation should be assessed by a jury, it meant such a jury as the general assembly should authorize and require for the trial of questions of that character. When it was determined that the jury should consist of twelve, as in the case of a right of way, that number was expressly mentioned, thereby withdrawing from the legislature the discretion which it could otherwise have exercised.

In any other view of the case there was no necessity for incorporating into the constitution section 5 of article 13. If a jury *in every case*, of necessity consisted of *twelve* men, it was fully provided for in the first of these sections.

Marsh & Ball, for defendant in error:

The defendant in error claims that section 19, article 1, of the constitution, is not correctly interpreted by the plaintiff in error; that it is not divisible, as by him suggested; that a jury is required to determine the compensation to be paid to the owner *of [497 land through which a road is laid out; that the framers of the constitution meant something when they substituted the word *jury* for the word *viewers*; that a jury in civil as well as criminal cases must be composed of twelve men; that section 5 of article 13 can not have the bearing upon article 1, section 19, that the plaintiff contends it has; that costs in the probate court, on appeal, should be taxed against the appellee when the compensation is increased on the review; that costs in that court should not be taxed against the appellant when, upon the review, the location is materially changed, as in this case.

That exception to the proceedings in the probate court which is based upon the fact, which appears by the record, that the case was heard in that court on a different day from that to which it was continued, I wish to withdraw; we ask nothing in consequence of that delay, whether the exception was well taken or not.

THURMAN, C. J. On March 6, 1854, the plaintiff, Shaver, and others, petitioned the trustees of Blue Rock township, Muskingum county, to lay out and establish a township road through the lands

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of the defendant, Starrett, and others. Such proceedings were had that, on April 3, 1854, the road was established by the trustees, and \$40, Starrett's damages, assessed by the viewers, ordered to be paid to him. He appealed to the probate court, by which reviewers were appointed, who reported in favor of establishing the road, with a slight variation, and assessed his damages at \$50. The court confirmed this report, and he filed a petition in error in the common pleas; on the hearing of which, said order of confirmation was reversed. To reverse this judgment of reversal, the present petition is prosecuted.

It is unnecessary to notice the various assignments of error filed in the common pleas. There is one of them—going to the very foundation of the proceedings—that fully sustains the judgment 498] *of the court, to wit, that Starrett's land was taken for a public use without compensation having been assessed by a jury.

The constitutionality of the statutory provisions for the establishment of township roads, has lately been questioned, upon the ground that the land appropriated for such roads is not taken for a *public* use. If this were so, the invalidity of the statute would be manifest, since the constitution provides (art. 1, sec. 19) that "private property shall ever be held inviolate," and the only exception. to this rule is, that it shall be "subservient to the public welfare." It follows that it can not be taken for a mere private use; nor could it, I apprehend, were there no express constitutional provision upon the subject—and this for the plain reason, to say nothing more, that no such power has been delegated to the assembly.

But is a township road a mere private way, and the land appropriated for it taken for a mere private use? We do not think so, and have held the contrary at the present term, in the case of *Ferris et al. v. Bramble et al.* It is true that that case arose under the former constitution, but that makes no difference, for that constitution also prohibited the taking of private property for any but a public use.

The objections to the statute under this head are, that the road may be established if found necessary for the "convenience" of the applicant or applicants, and their neighbors; that it is to be kept open and in repair at the expense of the applicants, and that it is not expressly declared by statute to be a public highway, but on the contrary, is denominated a "private or township road." These

provisions and characteristics, it is said, show that the road is not laid out for the public use.

It is unnecessary at this time to elaborately answer these objections, for it is not in this case that they were made; and, besides, I consider it more proper to refer to the opinion that will be drawn up in the case above mentioned. I will say, however, that if there is any validity in them, they were equally valid against [499 every township road law ever enacted in this state, and it is somewhat singular that their force was not perceived until after the lapse of nearly half a century.

What is a public use, and how many of the people must be interested in the establishment of a road before it can be said to be laid out for the "public welfare?" Is not a use public, when every person in the state has a right to it? If so, why is not the use of a township road a public use? It is true, it is kept open and in repair at the expense of the applicants, but they have no more right in or over it than any other citizen or inhabitant. It is just as subject to public travel, just as free and open to every individual, as any other road in the state; and this public character is in nowise affected by the name given to it in the statute or the failure to call it a public highway.

But there must be a public *necessity* for the use, it is said, to justify taking private property for it. The words of the constitution are, "public welfare," but I have no objection to the term "necessity," provided that it be not used as synonymous with "*indispensable*." Rightly understood, I assent to the proposition; but what is a public necessity or the public welfare? Must every citizen in the state have a particular interest in the establishment of a state road, every citizen of a county a like interest in respect to a county road, and every citizen of a township such an interest in a township road, before it can be said that they are required for the public welfare? I think this will hardly be pretended, and if not, then it must be admitted that the welfare—or the "convenience," which may mean the same thing—of a less number of the people may suffice. And applying the familiar maxim, that a law is to be construed with reference to its *subject-matter*—which is just as true of constitutions as of statutes—it will not be found difficult to say that the persons interested in the establishment of a mere township road need not be so numerous as would be required to create a public necessity for a state or county road. A necessity for the convenience of

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500] *the applicants and their neighbors, is what the statute requires, and if it be properly understood and be administered as it ought to be—and not converted into an instrument to take private property for mere private advantage without any public necessity—we do not think the constitution will be violated in the particular I have been considering.

But there is a fatal objection to the present law, growing out of a provision in the existing, that was not contained in the former constitution. The statute makes no provision for a jury, in the proper sense of the term, to assess the damages of the property holder. This defect we held to be fatal in the case of *Lamb and McKee v. Lane*, ante, 167, and after carefully reconsidering the grounds of that decision, with the aid of the reargument of them in this case, we find no reason to change our opinion, but, on the contrary, are more strongly confirmed in it.

The judgment of the common pleas must therefore be affirmed.

THE SCHOONER *MARINDA v. THOMAS DOWLIN*.

A petition in error can not be sustained unless filed within three years after the rendition of the judgment sought to be reversed, except in a case of disability specified in section 523 of the code, and this is equally so in respect to judgments rendered before the code took effect as in respect to those rendered afterward.

A petition filed after the lapse of three years, when there was no such disability, will be stricken from the docket.

At the February term, 1850, of the Superior Court of Cleveland, Thomas Dowlin recovered a judgment against the schooner *Marinda*. To obtain a reversal of this judgment the schooner filed a petition in error in the Supreme Court, at December term, 1854. 501] Dowlin now moves that the petition be dismissed, because *it was filed more than three years after the rendition of the judgment.

Willson, Wade & Wade, for the *Marinda*.

Willey & Carey, for Dowlin.

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THURMAN, C. J. Under the practice act of 1831, a judgment could be reviewed on a writ of error sued out within five years after its rendition. But this act was repealed by section 606 of the code, with no other saving than of actions, suits, or writs, pending when the code took effect, and by section 530, writs of error in civil cases are expressly abolished. See Code, sections 530, 602, 606, and 610. By section 515 a petition in error is given, and by section 602 it is declared that "the provisions of this code shall apply after a judgment, order or decree *heretofore* or hereafter rendered, to the proceedings to enforce, vacate, modify or reverse it, except as provided in section five hundred and thirty-three." Section 533 relates to chancery proceedings only. One of the provisions above referred to is found in section 523 which declares that "no proceeding for reversing, vacating, or modifying judgments or final orders shall be commenced unless within three years after the rendition of the judgment, or making of the final order complained of; or, in case the person entitled to such proceeding be an infant, a married woman, or person of unsound mind, or imprisoned, within three years as aforesaid, exclusive of the time of such disability." The language of these sections is too explicit to leave room for doubt, and a court can not do otherwise than follow its natural import. It is plain, that except in a case of disability as aforesaid, a petition in error can not be sustained unless filed within three years after the rendition of the judgment sought to be reversed, whether it was rendered before or after the code took effect. In coming to this conclusion we have not overlooked the savings in sections 6 and 8, but they do not touch *the present question. A right to in- [502]stitute a proceeding in error is rather a right of appeal than a right of action, and it was perfectly competent for the legislature to curtail it as they have done.

The leave given to file this petition was improvident and must be rescinded and the cause be stricken from the docket.

Schooner *Marinda v. Swain. Roberts et al. v. Dust et al.*

THE SCHOONER MARINDA v. VALENTINE SWAIN.

THURMAN, C. J. This cause presents the same question decided in the preceding case of *The Marinda v. Dowlin*. The leave to file the petition must be rescinded and the cause stricken from the docket.

Wilson, Wade & Wade, for the *Marinda*.
H. Foote, for *Swain*.

MARY A. ROBERTS ET AL. v. JOSEPH E. DUST ET AL.

Where a person is restrained by injunction from making a race to his mills and the conditions of the injunction bond are, that the obligors will pay all moneys and costs due and to become due, from the complainant in the bill, and all moneys and costs which shall be decreed against him, and the bill is dismissed at the costs of the complainant, the person so restrained can sustain an action on the bond against the complainant and his sureties, to recover the damages sustained by reason of the injunction.

ERROR to the district court of Miami county.
The case is stated in the opinion of the court.

E. Parsons, for plaintiff in error.
Conover & Craighead, and *C. L. Vallandigham*, for defendant in error.

503] *KENNON, J. Mary A. Roberts and others brought an action of debt on an injunction bond, in the court of common pleas of Miami county, against Joseph E. Dust and others.

The bond was conditioned in these words:

"The condition of the above obligation is such that whereas the above-named Joseph E. Dust has obtained the allowance of an injunction in the court of common pleas of Miami county and State of Ohio, to enjoin and restrain the above-named obligees from excavating or cleaning out a race running through certain premises of

said Dust, situated in the town of Tippecanoe, Miami county, and around the mill of said Dust, situate therein; and also restraining and enjoining them from using any part of the water from the Miami canal through the same premises to the property below, as more fully shown in the bill of said Dust, filed on the chancery side of the Miami county common pleas, until the matter thereof can be heard in equity. Now, if the said Joseph E. Dust shall pay all moneys and costs due and to become due from him, and all moneys and costs which shall be decreed against him in case said injunction shall be dissolved, then this obligation shall be void; otherwise in full force and virtue in law."

The plaintiffs in their declaration assigned for a breach of the bond, that on June 20, 1850, the Supreme Court dismissed the bill in chancery and dissolved the injunction, at the costs of the defendants; that the plaintiffs, from the time of the allowance of the injunction until the time of its dissolution, were deprived of the control and use of the mill-race, and of the waters that used to flow through the same to the mills of the plaintiffs, by means of which the plaintiffs were deprived, during all that time, of the use of one saw-mill, one oil-mill, one corn-mill, and a carding-machine; and that by reason thereof they sustained damage to the amount of \$1,500, and that therefore they were entitled to judgment for the penalty of the bond.

The defendants cravedoyer of the bond and condition, and pleaded that they had, after the commencement of the action at law, [504 paid the costs of the proceedings in chancery as well as the costs of the action at law, up to the time of filing the plea. To this plea the plaintiffs demurred, and the district court of Miami county overruled the demurrer, and held the plea a good bar. To reverse this decision this writ of error is prosecuted.

The only question presented for our consideration is whether the obligors in the bond were bound to the plaintiffs for anything more than the amount of the decree of the court in favor of the plaintiffs at the time of the dissolution of the injunction and dismissal of the bill. The district court held that, as the decree of the old Supreme Court was for costs only, that the payment of these costs was a full compliance with the condition of the bond.

The plaintiffs in error contend that the obligors were bound to pay to them such damages as the plaintiffs had sustained by reason of being restrained from using the water accustomed to flow along

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the race, thereby depriving them of the use and benefits of their mills. This question must be determined by the bond. What is a fair construction of the instrument? What did the parties intend by this instrument? In determining this question we look not only to the words of the bond, but to the facts and circumstances referred to in the bond itself. That part of the condition of the bond upon which the plaintiffs rely, is in these words: "Now, if the said Joseph E. Dust shall pay *all moneys and costs due and to become due* from him, *and all moneys and costs which shall be decreed against him in case said injunction shall be dissolved*, then this obligation to be void." The construction put upon this bond by the district court was, that if the said Joseph E. Dust should pay all moneys and costs which should be decreed against him in the chancery proceeding, he would have fulfilled the condition of the bond. This construction makes entirely inoperative that part of the condition of the bond which provides that Dust should pay all moneys and costs *due and to become due* from him. By the words of the bond he is not only to pay all moneys and costs due and to become 505] due, but *he is *also*, by the express language, to pay the amount which may be decreed against him on the dissolution of the injunction: it is not that he shall pay all moneys due and to become due, *or* the moneys that may be decreed against him, but he is, by the express condition of the bond, to do both.

If any effect can be fairly given to the first clause of the condition, it ought not to be rejected as mere verbiage. As a general rule, a liberal construction should be put upon written instruments, so as to uphold them if possible, and carry into effect the intention of the parties. In Broom's Legal Maxims, p. 347, it is said: "The two rules of most general application in construing a written instrument, are—1. That it shall, if possible, be so interpreted *ut res magis valeat quam pereat*; and 2. That such meaning shall be given to it as may carry out and effectuate, to the fullest extent, the intention of the parties. It is laid down repeatedly by the old reporters and legal writers, that in construing a deed, every part of it must be made, if possible, to take effect, and every word must be made to operate in some shape or other. The construction, likewise, must be such as will preserve rather than destroy; it must be reasonable and agreeable to common understanding, and as near the minds and apparent intents of the parties as the rules of law will admit."

The bond in this case is in the penal sum of \$1,500, and is required to be so by the order of the judge allowing the injunction; and it recites, that whereas the plaintiffs have been enjoined from excavating and clearing out a race, running through the premises of the defendant, and from using any part of the water of the canal through said premises to the property below, etc. It plainly appears what the object of the bill of complaint was, and what the plaintiffs were enjoined and restrained from doing. The court might have allowed the injunction upon such condition as it saw proper, and the order was, simply, that the defendants give bond and security in the sum of fifteen hundred dollars. The bond, however, has a condition, and is binding upon the parties *ac- [506] cording to the condition; although following strictly the order of the judge, the condition might have been the payment of the whole \$1,500, if the injunction should be dissolved. We, however, look at the bond and condition as they are, and to which defendants, by their signatures, agreed. It would be rather a strained construction of the instrument (and a still stranger condition to be in such a bond), that the plaintiffs should be enjoined, for an indefinite period of time, from doing a lawful act, and an act very beneficial to themselves, and yet the only condition upon which such restraint was imposed, was, that the defendants should pay the costs of the bill in chancery, and in order to secure such payment, the bond should be in the penal sum of \$1,500. There is no doubt that the court having jurisdiction of the matter by the bill filed, might, upon the dissolution of the injunction, have retained the case, and assessed the damages in favor of the plaintiffs in this case, arising in consequence of the injunction; but there is as little doubt, that the court might simply dismiss the bill, and leave the parties to their action at law on the injunction bond. If the court in this case had assessed the damages on the final hearing of the chancery case, and decreed that the complainants pay the same, it is very clear that the obligors in the bond would have been liable for the damages thus decreed, under the words, "and all moneys and costs which may be decreed against him." The court, however, have decreed nothing against the defendants except costs. The defendants, in substance, admit by the pleadings that the plaintiffs have sustained damages, over and above the costs, by reason of the illegal restraint imposed upon them, but insist that, by the condition of the bond, they are not bound to pay any part

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of these damages; that the words, "all moneys due and to *become due*," have no meaning, or at least can not be construed to extend to damages. But the known maxim of the law, "that all the words of the instrument are to be made to operate if possible," would seem to require of us to give the words, "all moneys and costs due and to become due from him," some operation, if possible. 507] *These words, however, can have no operation at all, unless they apply to the damages which the plaintiffs may sustain by reason of the injunction. If no bill had been filed, and if the plaintiffs in this case had, by force, been restrained by defendants from taking the water of the canal through the race to their mills, an action might have been sustained against the defendants and damages recovered; but what would these damages have been but money, and money coming from the defendants to the plaintiffs? and money, too, which the defendants ought to have paid without suit, and which, in the ordinary and common acceptance of the words, would be due from the defendant to the plaintiff. The plaintiff, on the dissolution of the injunction, had sustained damages by the act of the defendant. Money which he ought to pay without any litigation, and which, without giving to the words "money due," any strained interpretation, means damages; and by giving to them the same meaning as though the word damages had been used, then every word in the condition would have an operation, and, as a majority of this court think, would carry out the intention of the parties to the instrument. Any other construction would give to the instrument a meaning which the parties never intended, and would render a portion of it a mere nullity. It is thought however that, inasmuch as a part of the defendants are mere sureties, the instrument should be so construed as to operate favorably to sureties; but I know of no principle of law which would require us to reject a part of the instrument because part of the obligors were sureties.

The judgment of the district court is reversed.

***ALEXANDER McLAUGHLIN v. JAMES McLAUGHLIN. [508**

The courts of probate in this state, by section 2 of the act of March 15, 1853, defining their jurisdiction and regulating their practice, were invested with power, upon final settlement with the administrator of an intestate estate, to order distribution of the money remaining in his hands to the persons entitled thereto.

There exists no constitutional impediment to conferring such power upon that court.

In the exercise of this jurisdiction, the court is authorized to determine every disputed question of fact (or, in its discretion, to cause the same to be determined by the verdict of a jury) which may be necessary to ascertain the amount justly due from the administrator to such distributees.

Such order of distribution has so far the force and effect of a judgment that it may be enforced by execution.

The powers of the court are exhausted when the order of distribution is made; and it has no jurisdiction to entertain a petition brought to enforce the collection of the amount awarded to the distributee as a debt against the administrator.

ERROR to the probate court of Columbiana county.

- The case is stated in the opinion of the court.

W. K. Upham, for plaintiff in error:

The probate court is of special and limited jurisdiction; it has no original common-law jurisdiction, no more than it has original chancery jurisdiction. *Gilliland v. Adm'rs of Sellers*, 2 Ohio St. 223.

The proceedings before the probate court, filing the petition and answer, and the trial by jury, were clearly irregular.

The court of common pleas was the proper tribunal, to which the defendant in error should have resorted. Suits in the courts of common pleas, in assumpsit (*Negby v. Gard and wife*, 20 Ohio, 310), on the bond (*Ohio Rep. passim*), have always *been [509 maintained in favor of a legatee or distributee of a decedent; resort also has been had to chancery. 6 Ohio, 429.

The proper course for the defendant in error, either under the old or new law, was and is by citation and proper notice.

The proceedings before the probate court were null and void.

Wm. D. Ewing, for defendant in error, presented an argument, of which the following are the propositions:

McLaughlin v. McLaughlin.

I. The probate court had "exclusive jurisdiction to direct and control the conduct and settle the accounts of executors and administrators," and to enforce the payment of the debts and legacies of deceased persons, and the *distribution of the estates of intestates*. 51 Ohio Stat. 167.

II. The probate judge had power to order any question arising before him in the above duty, *in his discretion, to be tried by a jury*. In this case he exercised that discretion *by trying the case by a jury*, and the exercise of discretionary powers is not a thing subject to be corrected, even if erroneously exercised.

III. Even if in the mode of the trial or calling the jury there were irregularity, no injustice having been done, and the case being within the jurisdiction of the probate court, this court will not reverse the proceedings, either in the whole or in part.

RANNEY, J. The plaintiff in error was appointed administrator of the estate of Margaret McLaughlin, as early as April, 1843. A final account was filed in the probate court, in 1852; which, after being referred to, and reported upon, by a master, was settled by the court in September of that year. The principal exception taken to the account, related to a release of all the interest of the defendant in error in the estate of Margaret McLaughlin, dated on the 8th of November, 1844; which the administrator presented as a voucher, and claimed to be credited with the payment of the share of the defendant, in the estate. At the time it was executed, the 510] plaintiff in error was also the *administrator upon the estate of Catharine McLaughlin; from which, in 1847, he received as the administrator of Margaret over four thousand dollars.

It was claimed that a note at the foot of this release, stating that the paper had "no" reference to the estate of Catharine McLaughlin had been fraudulently altered, so as to make it read that the release had "a" reference to that estate. The master did not determine this question; but being of opinion that the release was not, within the meaning of the statute, a proper voucher for the payment of the share of James McLaughlin as an heir to the estate, he disallowed it, and found due to said James the sum of \$1,011. This report was approved and confirmed by the court, and the administrator was ordered to distribute and pay over that amount according to law.

About one year thereafter, the said James filed in the probate

court an original petition, setting up the amount found due him, and the order of distribution; averring the alteration of the release, and praying for a judgment for the amount with interest, less the sum actually received by him when the release was executed. The administrator answered the petition, denying the alteration of the release; and this issue being submitted to a jury, a verdict was returned finding the release altered as charged in the petition, and assessing the damages of the petitioner at \$838.56, upon which the court rendered a judgment for that amount. This petition is filed to reverse that judgment; and the error assigned is, that the court had no jurisdiction to entertain this last proceeding.

The question depends upon the act of March 14, 1853, "defining the jurisdiction and regulating the practice of probate courts." 51 Ohio Stat. 167. By section 2 of that act it is provided that the probate court shall have exclusive jurisdiction "to enforce the payment of the debts and legacies of deceased persons, *and the distribution of the estates of intestates.*"

This is the only provision of the act, having any relation to this *case, conferring jurisdiction upon that court. Its language [511] is too explicit to admit of doubt as to what was intended. The legislature manifestly intended to invest the court with authority to compel executors and administrators to pay over to the persons entitled the proceeds of all the property which might come into their hands to be administered, whether such persons might be creditors, legatees, or distributees. Creditors have the first lien upon the fund; and when their claims were ascertained and liquidated by allowance, judgment, or award, it became the duty of the court to compel an application of the assets to their satisfaction. When these were paid, whatever might remain would belong to legatees or distributees; and the same full authority was given to enforce the payment of their claims upon the estate. The act did not extend so far as to permit the executor or administrator to sue in that court for a debt due to the estate, or to subject him to be sued there for a debt disputed by him; but when the funds were in his hands, and the creditors were ascertained, and their debts liquidated, it conferred full power upon the court to compel him to do his whole duty in disbursing the fund, as well to legatees and distributees as to creditors.

These powers may have been injudiciously large; and the inference is very strong that they were thought to be by the legislature,

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from the fact that the section was repealed by the amendatory act of May 1, 1854, and re-enacted with no other change than that of substituting for the clause above quoted, the power "to order the distribution of estates."

This case does not call for a construction of the amendatory act, but the conclusion is irresistible, that some change was intended; and as the specific power to *enforce the payment* of debts, legacies, and distributive shares is omitted, it may not unreasonably be supposed that, in the opinion of the general assembly, the determination of the difficult questions of law and fact often involved in the settlement of the rights of legatees and distributees, ought not [512] longer to remain with that court; and that the *order of distribution here referred to, should be a general direction to the administrator or executor to disburse the amount remaining in his hands, after a final settlement of his account, and to be used as a foundation for his liability, when sued elsewhere, rather than a specific ascertainment of the amount due to each legatee or distributee, and its enforcement by execution. But however this may be, we can not doubt that these powers were conferred by the act of 1853; and we know of no constitutional objection to the act in this particular.

Whether these powers fell within the specific description of probate jurisdiction, as defined by section 8, of article 4, of the constitution, or not, is wholly immaterial; as the same section authorizes that court to exercise "such other jurisdiction as may be provided by law." That act provided all the necessary means for the full and efficient exercise of this jurisdiction. By section 28, the judge was empowered to determine every disputed question of fact which it might be necessary to settle before making the necessary order, or, in his discretion, to cause the same to be determined by a jury, or referred; while section 15 provides for enforcing all his orders for the payment of money by execution, "in the same manner as judgments in the courts of common pleas."

We are therefore brought to the conclusion, that the court had jurisdiction, not only to settle the accounts of executors and administrators, but also to determine the amount due to each legatee or distributee, and to order the payment thereof; and—without undertaking to determine whether such order would, in every respect, be conclusive—that it had so far the force and effect of a judgment, that it might be enforced by execution. But the powers of the

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court were exhausted when the order of distribution was made, and it had no jurisdiction to entertain an original petition, brought to enforce the collection of the amount awarded to the distributee, as a debt against the administrator. The power to make the original order, was derived from the jurisdiction already acquired [513 over the administrator, for the purpose of settling the estate, and from the authority given to compel a full settlement, by enforcing the payment of all the moneys that had come to his hands. When the order was made, the distributee had his election—to enforce it by execution or to treat it as a debt of record against the administrator, and sue for and collect it under another proceeding. But the probate court had no power to entertain such a proceeding. Its jurisdiction over the administrator having terminated when the final order was made, it had no jurisdiction to call upon him again to answer in that court. It erred in attempting it, and for that cause its judgment must be reversed.

JACOB STOBBER, ADMINISTRATOR OF JOHN STOBBER, DECEASED, v.
JACOB McCARTER.

In an action against an administrator for work and labor performed for the intestate, the widow of the intestate is a competent witness, at the common law, for the plaintiff, to prove the performance of such work and labor, where her testimony is not a disclosure of her husband's conversations or admissions; nor of matters, the knowledge of which was acquired by her in conjugal confidence; nor of matters prejudicial to her husband's reputation.

In error to the district court of Ashland county.

March 19, 1853, McCarter brought an action of assumpsit against Jacob Stober, as administrator of John Stober, deceased, to recover the price of work done for, and goods sold to, the intestate.

Upon the trial, July, 1854, in the district court (to which the cause had been appealed), upon the issue of non-assumpsit, a bill of exceptions was taken, which is as follows:

*"Be it remembered, that on the trial of this cause in said court, [514 at the July term thereof, A. D. 1854, the said plaintiff (McCarter), to maintain the issue on his part, caused Catharine Stober to be sworn

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as a witness for him in said cause, who, before giving other testimony, swore on her *voir dire*, that she was the widow of said John Stober, deceased; and thereupon said defendant (Jacob Stober, adm'r), objected to said Catharine Stober being examined as a witness, or giving further testimony to any thing then involved in the issue in this cause, which took place or transpired during the existence of the marriage relation between her and said John Stober; which objection was overruled by the court, and said Catharine Stober permitted to give her evidence, on the trial aforesaid, as a witness for the plaintiff; and then and there, in answer to the plaintiffs interrogatories, the said Catharine Stober testified that after her marriage with said John Stober, and while he and she were husband and wife, the said plaintiff, Jacob McCarter, performed work and labor for said John Stober in his lifetime, at sundry times during the last thirteen years next before the death of said John Stober, who died in January, A. D. 1851; that, during the time aforesaid, the said plaintiff worked at harvesting, attending saw-mill, repairing barn and all kinds of work, for said John Stober. To all which testimony of said Catharine Stober, the said defendant objected, which objection was overruled by the court, and the testimony permitted to go to the jury; to which ruling of the court, in permitting said Catharine Stober to testify as a witness as aforesaid, and in allowing her said testimony to go to the jury as aforesaid, said defendant excepted," etc.

A verdict and judgment were rendered in favor of McCarter, whereupon this petition was filed praying for a reversal of the judgment, upon the ground that the court erred in holding that Catharine Stober was a competent witness, and in permitting her to testify as aforesaid.

515] *Given & Jeffries, and Kinney & Porter*, for plaintiff in error:

This cause was brought under the old procedure.

We assume that, where a suit is brought against an administrator for services, etc., done for the intestate in his lifetime, the widow of such intestate is incompetent, as a witness for the plaintiff, to testify to anything involved in the suit which occurred during the marriage relation between her and the deceased; and rely on 1 Greenl. Ev. 444, and 18 Ohio, 526.

Fulton & McCombs, for defendant in error :

The "act to improve the law of evidence," as passed by our legislature, is substantially a re-enactment of Lord Denman's act (6 & 7 Vict. c. 85), with the exception that the proviso of Lord Denman's act is omitted in our act. That proviso renders the husband and wife incompetent to testify for or against each other.

The third section of the "act to improve the law of evidence" (3 Curw. Stat. 1522) provides, that "no person offered as a witness shall be excluded by reason of his or her interest in the event of the action," etc.

If it was necessary to insert the proviso in Lord Denman's act to render the wife incompetent, is she not clearly competent under our statute without the proviso? She is clearly competent under the 3d section. The English act, with the decisions of their courts under it, will be found in 9 West. Law Journal, 326.

The bill of exceptions discloses no privileged communication between the deceased and the witness, Catharine Stober. She could not, therefore, on this ground be excluded.

The evidence, as disclosed by the bill of exceptions, also shows that the testimony of the witness was wholly against her own interest, and of such character that it came only to her knowledge by means equally accessible to any person not standing in that relation; that it was not confided to her by the husband.

The plaintiff in error relies upon the case of *Cook v. Grange*, 18 Ohio, 526; 1 Greenl. Ev., sec. 254, etc., etc.

*If the widow of the deceased would be incompetent, ac- [516
cording to the rule of the common law, that incompetency is removed by the act referred to.

The case in 18 Ohio was determined at the December term, A. D. 1849, and before the "act to improve the law of evidence" was passed and took effect. It can not, therefore, apply to the case at bar.

THURMAN, C. J. Catharine Stober was not a party to the action, nor was she incompetent as a witness, on the ground of interest. She was called by the party to whom her interest, if she had any, was adverse; but had she been called by the administrator, her interest would not have disqualified her. See "act to improve the law of evidence," 2 Curw. 1522, sec. 3; *Butt v. Butt's Adm'r.*, 1 Ohio

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St. 222; Hart v. Stephens, 6 Adol. & Ell. N. S. 937; S. C. 51 Eng. Com. Law. 937; 9 West. Law Journal, 328.

If, therefore, she was incompetent, her disqualification arose from considerations of public policy, unconnected with interest. It is well known that the rule that forbids husband and wife to testify for or against each other, or where either is interested, is not limited to the duration of the marital relation, but for excellent reasons, whose importance can hardly be overestimated, continues beyond it. 1 Greenl. Ev., sec. 337. But whether the rule does not undergo some modification upon the dissolution of the marriage, is a question upon which the language of judges is scarcely reconcilable. This is owing not so much, or at least not so often, to any real difference of opinion, as to a somewhat incautious generality of expression, and to the additional fact that, by some courts, the question of competency has been treated as one of *interest* merely, while, by others, an enlarged and philosophical view of it has been taken.

One of the earliest, and a leading case on this subject, is *Munroe 517] v. Twisleton*, Peake's Ev. App. 87. It was an *action of "assumpsit, for the board and lodging of an infant child of the defendant. To prove the contract, the plaintiff called Mrs. Sandon, who at the time of making it was the wife of the defendant, but had since been divorced from him by act of parliament, and was married again."* She was objected to, and the objection sustained. Lord Alvanley said:

"To prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or anything else which happened during the coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband, and miserable, indeed, would the condition of a husband be, if, when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, intrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice. If she might be a witness in a civil proceeding, she might equally be so in a criminal prosecution; and it never shall be endured, that the confidence which the law has created, while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party—for misconduct alone can have that effect—the relation has been dissolved."

It is obvious that these remarks apply chiefly to cases where the

witnesses have been divorced, and not to those in which death has sundered the marriage relation. The latter case was not before the court, and the manifest scope of the opinion and the tenor of the last sentence especially, would seem to indicate that it was not in the judge's mind.

In *Aveson v. Lord Kinnaird*, 6 East, 192, upon the case of *Monroe v. Twisleton* being cited, Lord Ellenborough observed: "That goes on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. I doubt whether what Lord Alvanley there said was meant by him to be applied to the circumstances *of that case; [518 for it is generally considered that matters of domestic concern are intrusted to the wife. I rather consider him to have mentioned it as a general doctrine, that trust and confidence between man and wife shall not be betrayed, and as such it is sound doctrine."

This limitation has been frequently approved since it was suggested by Lord Ellenborough, and a distinction has also been made between cases in which the marriage contract was dissolved by a divorce and those in which it was terminated by death.

Thus, in *Beveridge v. Minter's Executors*, 1 Car. & P. 364; 11 Eng. Com. Law, 421—which was an action upon an alleged promise of the testator to pay £150 to the plaintiff—the widow of the testator was held to be a competent witness for the plaintiff to prove the promise. As no suggestion is found in the report that her testimony would violate any confidence reposed in her, it is presumable that such was not the case.

Doker, executor of Doker, v. Hasler, sheriff of Sussex, Ryan & Moody, 198; 21 Eng. Com. Law, 416, was an action for a false return to a *fi. fa.* "The defense was that the execution was fraudulently taken out in order to protect the goods of the debtor against his assignees, under a commission of bankruptcy. In order to prove this, the widow of the testator was called and asked to a conversation between herself and the testator. This was objected to on the authority of *Monroe v. Twisleton*."

Best, C. J., said: "I remember that in that case, in which I was counsel, Lord Alvanley refused to allow a woman, after a divorce, to speak to *conversations* which had passed between herself and her husband during the existence of the marriage. I am satisfied with the propriety of that decision, and I think that the happiness of the marriage state requires that the confidence between man and

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wife should be kept forever inviolable. The point is of very great importance, and I will reject the evidence, in order that the question may receive a solemn discussion in case my present opinion should be thought unfounded."

519] *A further consideration was rendered unnecessary by a verdict for the defendant, but had the question been again discussed, there is little, if any, reason to suppose that the ruling would have been changed. For surely the presumption was that if the husband disclosed to his wife a fraud he designed to perpetrate, he did so in confidence; a presumption not subject perhaps to disproof; but whether so or not, there was no offer to disprove it. Again, the testimony tended to injure his reputation to a very serious degree, an objection which, of itself, has been held to be sufficient.

In *Coffin v. Jones*, 13 Pick. 445, Wilde, J., speaking of the cases upon this subject, said: "They only decide that a widow is not allowed to disclose *conversations* between her and her husband, but not that she is incompetent to testify as to other matters."

Of the same opinion was the Supreme Court of Vermont, in *Williams v. Baldwin*, 7 Vt. 506; where, after a reference to the general rule of exclusion, it is said: "This rule is too important to the peace and confidence of married life to be disturbed, but we think it was not applicable in the present instance. The witness was not called to disclose communications made by her late husband, but to state independent and distinct facts; the possession by him of the plaintiff's letters, as ascertained from inspection by the witness herself."

In *Edgell v. Burnett & Lowell*, 7 Vt. 534, a widow was permitted to testify to declarations made by her late husband during the coverture; but it was also held that the testimony would not be admissible if offered "to contradict and impeach the testimony which he gave on a former trial between the parties."

Ratcliff v. Wales, 1 Hill, 63, was an action for *crim. con.* with the plaintiff's wife. After a divorce, *a vinculo*, he offered her as a witness to prove the adultery. She was permitted to testify, and the 520] ruling approved on a motion for a new trial. *The court said, *inter alia*: "For the purpose of promoting a perfect union of interests, and securing perfect confidence between husband and wife, the courts have generally refused to admit the wife as a witness against the husband, even after the marriage contract was at an end, when she was called to speak of any matter which happened

during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character. But in the case at bar, the witness was not called *against* her former husband, nor was she asked to betray any confidence which he had reposed in her during the coverture. The fact which she was offered to prove, did not even come to her knowledge in consequence of the marriage relation."

This decision was approved and followed, by the Supreme Court of Massachusetts, in the case of *Dickerman v. Graves*, 6 Cush. 308.

In *Cook v. Grange*, 18 Ohio, 526, it was held, that a woman who has been divorced, is not a competent witness against her late husband, to prove a contract made by him during the coverture; and the judge who delivered the opinion went quite as far as did Lord Alvanley in *Monroe v. Twisleton*. He repudiated a distinction, so far as that case was concerned, between confidential communications and those not confidential, and between conversations and other independent facts, and laid down the rule broadly that the divorced witness was incompetent to testify to any fact which could not have been proved by her when it occurred. But he said nothing as to the rule in cases where the dissolution of the marital relation was occasioned by death.

Barnes v. Carnack, 1 Barb. 392, is to the same effect as *Cook v. Grange*, and goes fully as far. It also was a case of a divorced witness, and the very strong and general language of the judge should, I suppose, be restricted accordingly. It is not probable that he meant it to apply, in its full extent, to the case of a widow offered as a witness.

**McGuire v. Maloney*, 1 Ben Monroe, 224, "was an action [521 of trover, brought by John Maloney against McGuire, who, as administrator of John Maloney, Sr., the plaintiff's father, had sold divers goods and chattels, as belonging to the estate of the decedent, but which the plaintiff claimed to have been his property, under an instrument of writing purporting to have been executed by his father and himself, in the presence of two subscribing witnesses, and to transfer to him the property in question. To prove the execution of this instrument, the plaintiff introduced his mother, the widow of John Maloney, Sr., who stated, in substance, that the two subscribing witnesses were both dead; that she saw her husband write the instrument and sign the names of himself and the plaintiff, and also of the subscribing witnesses, whom she

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also saw make their marks; that she heard the two Maloneys make the agreement and acknowledge it, and that her husband handed the instrument to her at its date, and she had kept it ever since, whereupon, the instrument was handed to the jury. The defendant objected to the competency of the witness when she was offered, and afterward moved to exclude her testimony and the instrument from the jury." The circuit court overruled the objection and motion, and the plaintiff obtaining a verdict and judgment, the defendant appealed. The court of appeals affirmed the judgment, and stated the rule to be as follows :

"The law will not permit, even after the death of the husband, any disclosure by the wife which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and to affect, injuriously, the interests of society dependent upon it.

"But where there is not even a seeming confidence—when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be afterward public—there is no interest of the marriage relation or of society, which, in the absence of all interest in the husband or wife, requires the latter 522] *to be precluded from testifying between other parties, such act or declaration not affecting the character or person of the husband."

In *Caldwell v. Stuart's Ex'r*, 2 Bailey, 574, it was held that "the wife is a competent witness, in an action against the executor of her husband, to prove a parol gift by the husband in his lifetime. The dissolution of the marriage by death removes the objection arising out of the conjugal relation." After stating the general rule of exclusion in respect to husband and wife, Johnson, J., delivering the opinion of the court, proceeded as follows :

"In the case of *Monroe v. Twisleton*, the rule is, I think, with great propriety, extended to a wife who had been divorced *a vinculo matrimonii*. The sacredness of the confidence existing in the relation of husband and wife, ought never to be violated, unless for the most imperious necessity. But neither the rule, nor any of the reasons upon which it proceeds, have any—the most remote—application here. The husband is no party; he has ceased to have any interest in temporal concerns. The defendant, the executor, represents the interests of the creditors, legatees, or distributees, as

the case may be, and not the husband's. There is no danger of matrimonial discord, nor is there any violation of confidence. She has only disclosed what the husband intended should be known. Without it, his intention in making the gift would have been defeated."

In *Robin et al. v. King*, 2 Leigh, 140, it was held that a widow was not a competent witness, in a suit for freedom against a purchaser from her late husband, to prove that before the sale, in the presence of his family, and without any injunction of secrecy, her husband had declared that the mother of the plaintiff was an Indian woman. The court were of the opinion that, although there was no injunction of secrecy, the husband could not have intended that his admission that he was unlawfully holding the woman and her children in slavery—as was the case if she was an Indian—should be made public; and, consequently, the disclosure must have been confidential.

*In *Gaskill v. King*, 12 Iredell, 211, it was held that [523 after the death of a husband, the wife is a competent witness against his administrator, to prove the execution of a deed made by the intestate in favor of a third person.

And in *Pike v. Hays*, 14 N. H. 22, the court said: "There is no reason why the wife, after the death of her husband, should not state facts which came to her knowledge from other sources, and not by means of her situation as a wife."

See, also, in support of the competency of a widow, *Wells v. Tucker*, 3 Binney, 366; *Cornell v. Vanartsdalen*, 4 Barr, 364, and 1 Greenl. Ev., sec. 338, where the result of the authorities is thus stated:

"This rule, in its spirit and extent, is analogous to that which excludes confidential communications made by a client to his attorney, and which has been already considered. Accordingly, the wife, after the death of the husband, has been held competent to prove facts coming to her *knowledge from other sources*, and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband."

From this review of the authorities, it is quite apparent that the case of *Cook v. Grange* does not sustain the plaintiff in error; for whatever may be the true doctrine in respect to divorced witnesses, there would seem to be no reasonable doubt, at this day, that a widow, if not a competent witness to prove *conversations* with her

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husband, is competent to prove other independent facts that occurred during the coverture, the statement of which by her violates no confidence, nor is in anywise prejudicial to his reputation. Whether her competency, by the common law, goes beyond this and extends to conversations not confidential, it is unnecessary for us to say, for that question is not before us. Catharine Stober testified to no conversations at all, nor to anything the knowledge of which was derived through conjugal confidence, nor to anything prejudicial to the reputation of her deceased husband. The acts 524] proved by her were not the acts of *her husband, but of the plaintiff, McCarter; they were not private or confidential doings, but were open and public; not things of which she alone could have a knowledge, but facts open to the observation of every one. We think that she was a competent witness to prove them, and that her testimony was properly admitted; and in thus holding, we do not mean to question, much less to overturn, the authority of *Cook v. Grange*.

The code has no application to this case, which was pending when that statute took effect, but it may not be inappropriate to refer to its provision upon this subject, which was possibly intended as a mere affirmation of the common law. If that was the design, it obviously strengthens the conclusion at which we have arrived, for its language is as follows: "Husband and wife [shall be incompetent to testify] for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted, or afterward." Code, sec. 314.

Judgment affirmed.

JACOB F. AUBREY STEPHEN O. ALMY.

Where a court has jurisdiction of a form of action, its jurisdiction, in a particular case brought in that form, is not ousted by the evidence showing that the action is misconceived, and that some other form of action should have been resorted to. It is, simply, good matter of defense.

Under the act of 1831, to regulate proceedings in forcible entry and detainer, the court of common pleas had no authority to cause an assessment of rents and damages to be made, by a jury or otherwise, and give judgment therefor, except in cases where the justice's judgments were affirmed.

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A court of common pleas overruled an application for such an assessment, in a case in which the justice's judgment had not been affirmed. The order overruling the application was reversed by the late Supreme Court upon the circuit, and a *procedendo* awarded. The common pleas then caused the assessment to be made and gave judgment for it. *Held*, that the decision of the Supreme Court was no bar to a writ of error to reverse said judgment.

*WRIT of error to the common pleas of Hamilton county. [525
Reserved in the district court.

The case is sufficiently stated in the opinion of the court.

Chase & Ball, for plaintiff in error.

Woodruff & Hopkins, for defendant.

THURMAN, C. J. April 15, 1845, Almy recovered a judgment, in forcible detainer, against Aubrey, before a J. P. December 2, 1845, the judgment was reversed, on *certiorari*, by the common pleas, and the cause retained for trial. November 16, 1846, a trial was had, a verdict of guilty rendered, and a motion for a new trial made by Aubrey; which, after several continuances, was withdrawn December 30, 1847, and a judgment rendered upon the verdict, that Almy recover his costs and have restitution. Thereupon, Almy moved the court to impanel a jury to inquire into and assess the value of the rents and damages to which he had become entitled after the service of the notice to quit, or, at least, after the service of the summons; which motion was overruled, and he excepted. May, 1848, the Supreme Court in Hamilton county, upon *certiorari* prosecuted by Almy, reversed the order overruling said motion, and awarded a writ of *procedendo* to the common pleas. December 17, 1850, the common pleas, in obedience to the writ (after overruling a motion of Aubrey to dismiss the cause), impaneled a jury, who returned a verdict for Almy of \$396.41. Aubrey moved for a new trial, and also in arrest of judgment, both which motions were overruled, and he excepted. Judgment being rendered upon the verdict, this writ of error is prosecuted to reverse it.

Various errors are assigned, some of which go to the judgment of restitution, and impeach the jurisdiction of the court to render it. The facts in proof, it is said, presented a controversy in respect to the title to the premises, a question that could not be *tried [526 in an action of forcible detainer. If this position is correct, both in

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fact and law, there was a valid defense to the action, but it is not perceived that there was a want of jurisdiction. It was not the province of the court to find the facts—that was the business of the jury; and if the facts, when found by the jury, were such as, under the law laid down by the court, would not support an action of forcible detainer, the verdict should have been not guilty. Upon such a verdict the court could have rendered judgment; whereas, if it was wholly without jurisdiction, it could render no judgment at all, except to order the case to be stricken from the docket.

But all this is immaterial here, for the reason that no bill of exceptions setting out the facts proved, was taken, and we can not, therefore, know what the facts were. The bill taken before the justice of the peace in 1845, and that taken in the common pleas on the trial in 1850, are no evidence of what was proved on the trial in 1846.

And here I may add, that the common pleas had not erred in retaining the cause for trial after reversing the justice's judgment; for even if the transcript showed that the justice should have rendered a judgment for the defendant before him, because the proof made a case of controverted title in which forcible detainer would not lie, it did not follow that the proof would be the same in the common pleas. Justices had jurisdiction of the action of forcible detainer, and when their judgments were reversed by the common pleas, the statute required the cause to be set down for trial in the latter court.

Again, we are restricted by the writ of error, to the judgment of November term, 1850, for that is the only judgment mentioned in the writ, the only one it seeks to review.

That the court of common pleas was bound to obey the writ of *procedendo* from the Supreme Court, is obviously true; from which it follows, that if we reverse their judgment, we disregard the decision [527] of the Supreme Court. But, however inconvenient *in practice this may be, we do not perceive how it can be avoided, if we find the judgment to be erroneous. The decision is plainly no bar to the present writ, the object of which is to reverse a judgment rendered long after the decision was made; and although the question presented is the same as that formerly decided, it would have been equally so had the decision been made between different parties. It is unnecessary to consider what would be the proper practice had the *procedendo* been awarded by the court of the last resort

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—the Supreme Court in bank—for it was ordered by no such tribunal. It is true, that the court in bank was but a special session of the Supreme Court; nevertheless, the Supreme Court on the circuit was so far an inferior tribunal that its judgments were reversible by the court in bank, and are so by this court.

The question upon which this case turns is: was it lawful to assess and give judgment for Almy's rents and damages, in the action and mode in which it was done? The solution of this question depends upon the construction to be given to certain sections of the act of 1831, regulating proceedings in forcible entry and detainer. Swan's Statutes, old ed., 419, 420. By this act jurisdiction in forcible entry and detainer was conferred upon two justices of the peace, subject to review, upon *certiorari*, by the court of common pleas. By section 10, the plaintiff in *certiorari* is required to give bond to the defendant, "conditioned for the faithful prosecution of the said suit; and in case of failure, that he will pay all costs, rents and damages, which may be assessed to the defendant in *certiorari*, as hereinafter provided." By sections 11 and 12, it is enacted, that if the judgment of the justices shall be reversed, the plaintiff in *certiorari* shall recover costs, and the court shall retain the cause and proceed thereon to final judgment, as in cases of appeal, and if on trial, the jury find the defendant guilty of forcible entry and detainer, or forcible detainer only, the court shall render judgment for costs, and that the complainant have restitution of the premises. Sections 13 and 14 are as follows:

*"SEC. 13. That if the plaintiff in *certiorari* shall fail or [528 neglect to prosecute the said suit to final judgment, or if the judgment and proceedings in the court below shall be affirmed; then, and in every such case, the court of common pleas, on motion of the defendant or his counsel, shall render judgment affirming the judgment and proceedings below, and for costs; and shall award execution therefor, as in other cases.

"SEC. 14. That thereupon, if the plaintiff in *certiorari* were defendant below, it shall be the duty of the court, on motion, to direct a jury to be impaneled and sworn, to inquire into and assess the value of the rents accrued, and damages, if any, sustained, from and after the day on which notice to quit was served on such plaintiff in *certiorari*; or if no such notice was given, then from the time such plaintiff in *certiorari* was summoned in the proceedings below."

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We think it quite clear, that the only authority here given to assess rents and damages, is in cases where the judgments of the justices are affirmed; in other words, section 14 relates only to the cases mentioned in the 13th, and the condition of the bond relates to the same cases. There is no provision for any such assessment if the justice's judgment is reversed, nor was any such thing contemplated. If it had been, the jury impaneled to try the issue of guilty or not guilty, would have been authorized to make the assessment, for surely no such absurdity could have been designed, as that there should be one jury to try that issue and another to assess the rents and damages. But this absurdity is inevitable, upon any other construction than that we have arrived at; for it is admitted, and correctly too, that no authority is given to the jury that tries the issue to make any assessment.

The language of the act, also, is sufficiently plain, especially when proper regard is paid to its connection. The "faithful prosecution of the said suit," which is a condition of the bond, means a prosecution of the writ of *certiorari*; and there has been 529] *such faithful prosecution when a judgment of reversal is obtained. The "case of failure," mentioned in the bond—and upon the happening of which a liability to pay costs, rents, and damages, "as hereinafter provided," is incurred—is a failure to obtain a judgment of reversal. When a reversal takes place, "the said suit" of *certiorari* spoken of in the bond, has no longer an existence, and the cause is retained "as in cases of appeal." The connection between the 13th and 14th sections shows that they are upon the same subject, and, with the other considerations I have mentioned, makes it apparent, that the latter is limited to the cases specified in the former, which are all cases of affirmance.

It results from these views that the judgment in question must be reversed.

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F. and others, sureties of C., signed an instrument payable to S. or order, in blank as to the date, amount, and time of payment, but with a private agreement that it should not be filled for more than \$1,000 or \$1,500, and delivered it to C., the principal, to procure the discount. While in the hands of C., seals were affixed to the signatures by some one, without the knowledge or consent of the sureties; and, subsequently, the instrument was presented by C. to S., the payee, and filled up and discounted for the sum of \$10,000. *Held:*

1. That one who intrusts his name in blank to another, to procure a discount, is liable to the full extent to which such other may see fit to bind him, when the paper is taken in good faith, without notice, actual or constructive, that the authority given has been exceeded.
2. Such blank signature has the effect of a general letter of credit; and the rule is founded as well upon that principle of general jurisprudence which casts the loss, when one of two innocent persons must suffer, upon him who has put it in the power of another to do the injury, as also upon the rule *of the law of agency which makes the principal liable for the acts [530 of his agent, in violation of his private instructions, when he has held the agent out as possessing more enlarged authority.
3. The material alteration of a written instrument, made by a stranger, will not avoid it.
4. To have that effect, the alteration must be made by, or with the privity of, one claiming a benefit under the instrument, and (to give application to the doctrine upon that subject) after the instrument has been delivered and taken effect.
5. In such case, a remedy is denied, and the instrument is destroyed, as a punishment for the fraud of the party claiming a benefit under it.
6. In this case, C. was the authorized agent of F., to fill up the paper and procure the discount, having no title to, or interest in, the paper; and although not authorized to affix seals to the signatures, and, therefore, incompetent to bind F. thereby, his attempt to do so can not affect S., the payee.
7. Having fully executed and not exceeded his authority, by procuring the discount of the paper as a promissory note, his unauthorized act in affixing a seal may be treated as a nullity, and the instrument enforced in the manner and to the extent contemplated by the surety, as such promissory note.

ERROR. Reserved in the district court of Perry county.

The judgment in the court of common pleas was for Sturges, a motion for a new trial made by defendants being overruled. The case was taken on error to the district court. The facts were submitted to the court in an agreed statement, as follows:

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"Upon the trial of this cause, the parties, by consent, submitted the issue herein to the court in lieu of a jury, and the plaintiff then gave in evidence a paper, of which the following is a copy :

\$10,000.

THORNVILLE, OHIO, November 16, 1852.

Six months after date, for value received, we or either of us promise to pay William Sturges or order, at his banking-house in Zanesville, Ohio, ten thousand dollars. And we hereby authorize and empower any attorney, of any court of record in the United States of America, at any time after the above sum becomes due, to appear in any court within the said United States of America, for us and in our names, and confess judgment in favor of the legal holder of this note, for the said amount, interest and costs, and to [331] release all *errors and the right of appeal, and waiving stay of execution on said judgment. Witness our hands and seals, this 16th day of November, 1852.

(Signed,)

JAMES CULBERTSON,	[SEAL.]
JAMES CULBERTSON,	[SEAL.]
I. W. BURKIT,	[SEAL.]
JACOB BURKIT,	[SEAL.]
DAVID ZORTMAN,	[SEAL.]
JEREMIAH WOODRING,	[SEAL.]
SOLOMON ZORTMAN,	[SEAL.]
ABRAHAM S. HOOVER,	[SEAL.]
WM. J. FULLERTON,	[SEAL.]
ELIJAH FOSTER,	[SEAL.]
J. H. MITCHELL,	[SEAL.]
JACOB GOODIN,	[SEAL.]

And rests his case. The defendant then proved that, when he signed the paper, there was a blank following the word 'Nov.,' in the first line, and a second blank preceding the word 'months,' in the second line, and a third blank preceding the word 'thousand,' in the fifth line, and a fourth blank, occupying parts of the tenth and eleventh lines, between the word 'for' and the word 'and,' and a fifth blank in the seventeenth line, between the word 'this' and the word 'day.'

"Defendant further proved, that the plaintiff was a banker in Zanesville, and that the said blanks were all filled by the plaintiff on said November 16, 1852, when he discounted the paper; so that, after filling said blanks, the paper read as above at large set forth.

"The defendant then further proved, that when he signed the paper there was no seal on the same, and there were no seals on the same at the time when all the signatures of all the parties had been

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affixed, but that such seals, including the seal annexed to this defendant's name, were added (the evidence did not show by whom) after the parties had signed the same, and without this defendant's knowledge, authority, or consent, and before it came to the possession of the plaintiff.

"The defendant further proved, that he signed his name to said *paper in blank, and unsealed as aforesaid, at the request, [532 and for the accommodation, of James Culbertson, whose name is first signed to it; the said Culbertson being the principal, and all of the other parties his sureties thereon. Defendant further proved, that when the plaintiff received the instrument of writing from said James Culbertson, the plaintiff advanced to him a part of said ten thousand dollars in money, the residue of the consideration being something equal to money. The defendant further proved, that when he put his name to the paper, no one was present but the said James Culbertson, and that he told Culbertson that he would not agree to become surety for more than a thousand or fifteen hundred dollars.

"No other evidence was given in the case. Upon this evidence being heard, the plaintiff's counsel asked permission to give the paper in evidence, under the second and third counts of his declaration, which was accordingly done.

"It is agreed, that the above statement contains all the evidence introduced upon each of the trials, at the March term, 1854, of the Perry common pleas, wherein William Sturges was plaintiff, and each of the above-named singers, except the two Culbertsons, were defendants. March 16, 1854."

J. D. Maginnis, and Hunter & Finck, for plaintiff in error.

Mr. Hunter, in argument, cited *Master v. Miller*, 4 Term, 320; *Bank U. S. v. Russell and Boone*, 3 Yates, 391; *Woodworth v. Bank of America*, 19 Johns. 391; *Nargo and Green v. Fuller and Patterson*, 24 Wend. 374; 1 *Smith's Lead. Cas.*, top page, 572, 598, 599; *United States v. Linn*, 1 Howard, 104; 8 *Pick.* 325—as establishing that any material alteration, however insignificant, made by an intermediate party, as an indorser, etc., or while the instrument is in his hands, unexplained, renders it utterly void as between the holder and the maker, or any prior party.

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533] *C. B. Goddard, for defendant in error, cited 2 Parsons on Contracts, pt. 2, chap. 3, p. 223, sec. 8, "of alteration;" Truett v. Wainwright, 4 Gilman, 411; Waring v. Smith, 2 Barb. Ch. 119; Thornton v. Appleton, 29 Maine, 298; Arnold v. Jones, 2 Rhode Island, 345; Lambert and Pollard v. Carrol, Wright, 108; Selser v. Brock, 3 Ohio St. 302; Huntington & McIntyre v. Finch, Ib. 445.

RANNEY, J. This was an action of debt. The declaration contained three counts. The first set out a single bill for ten thousand dollars, dated November 16, 1852, payable to the plaintiff below or order, at his banking-house in Zanesville, six months after the date thereof. The second counted upon the same instrument as a promissory note; and the third was the indebitatus count, for money had and received, and money lent.

To the first of these counts, the defended pleaded *non est factum*, verified by affidavit; and to the two last, *nil debet*. The case was submitted to the court, and from an agreed statement of the evidence, appended to the bill of exceptions, it appears that the instrument was signed by the defendant below and eleven others; one of whom, James Culbertson, was, as between him and the other signers, principal, and the others his sureties, although not so expressed on its face. That at the time the paper was signed by all the parties thereto, and, by the sureties, placed in the hands of Culbertson, it was in blank as to the date, amount, and time of payment, and had no seals affixed to the signatures thereon. That, after that time, and before it came to the possession of Sturges, seals were affixed to each of the signatures; but by whom, was not shown by the evidence. The defendant, Fullerton, further proved, that the seal affixed to his signature was done without his knowledge, authority, or consent; and that at the time he signed the paper, at the request and for the accommodation of Culbertson, he informed the latter that he would not agree to become his surety for more than a thousand dollars. In this condition the paper was presented to Sturges, by Culbertson, on the day it bears date; and the blanks being filled by the former, the same was discounted for the sum of ten thousand dollars.

As nothing in the case tended to show any notice to Sturges, that Culbertson, in directing the instrument to be filled up for that sum, was exceeding the authority given him by Fullerton, it is very clear that the violation of any private instructions, which the latter may

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have given to the former, as to the amount for which he was willing to become liable, could not have been used to prevent a recovery for the sum named in the paper.

No rule is better settled, or founded upon stronger reasons, than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given has been exceeded, or the confidence reposed has been abused. It has the effect of a general letter of credit; and the rule is founded, not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agency, which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as possessing a more enlarged authority. These rules are indispensably necessary to prevent fraud and surprise upon third persons, and in their application to the usual course of dealing in commercial transactions, are to be considered as of vital importance. They are not questioned by the learned counsel for the plaintiff in error; nor does he contend that there was anything in the case that should have prevented a recovery, from the fact that the instrument was filled up for a larger amount than had been agreed upon between Culbertson and Fullerton. But he insists that Culbertson must be presumed to have added the seals, *after the paper was placed in his hands by [535 the sureties, and that this effected a material alteration of the instrument; and, being done without the knowledge or consent of Fullerton, avoids it in the hands of Sturges, notwithstanding he had no notice of the fact. That the alteration was made without the knowledge or express consent of Fullerton, must be admitted; that it was made by Culbertson, after the paper came into his hands, and before its presentation to Sturges, is highly probable.

It is also very true, that affixing a seal to the name of a party to a written instrument, when its legal effect would be in some way thereby changed, unquestionably is, and has often been held to be, a material alteration. But it is wholly unnecessary to consider whether such an addition made to an instrument of the character of the one declared upon in this case, should, in this state, where it has precisely the same legal effect, is subject to the same defenses,

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and barred in the same time, whether sealed or not, be deemed material. There has been no recovery had upon this paper as a sealed instrument. No evidence was given under that count of the declaration ; but the evidence was received and the recovery had upon the count describing it as a promissory note. That the plaintiff in error, by the paper he signed, fully authorized Culbertson to obtain a discount upon a promissory note, for the amount and in the manner he did, is unquestionable ; and that this instrument, when deprived of the seals, is, in legal effect, a promissory note, is not doubted. The true question therefore is, has Sturges, under the circumstances, a right to treat this paper as and for such an instrument as Fullerton authorized to be made ; or is it avoided by the unauthorized addition of a seal, made by Culbertson or some other person, without the knowledge of Sturges and before it came to his hands ?

It certainly binds Fullerton for no more than he authorized ; it contains no stipulations, that Sturges had not a right to suppose Culbertson authorized to make for Fullerton. Sturges committed **536]** *no fraud, and knew of no fraud. The instrument remains precisely as it came to his hands, without addition or diminution. This fact shows the entire inapplicability of most of the cases relating to the alteration of written instruments. To give application to many of the doctrines they enforce, the alteration must have been made after the delivery of the instrument, and after it has taken effect, and by or with the privity of one claiming a benefit under it. The rule of the English courts, that a material alteration, made by a stranger, avoids the instrument, has been universally repudiated in this country. To have that effect, the alteration must be material and intentional, not by accident or mistake ; and by a party entitled to a benefit under the instrument, and not by a stranger, or one adversely interested. 1 Gall. 69 ; 14 Serg. & Rawle, 405 ; 8 Cow. 71 ; 1 Watts, 237. Fraud in the interested party lies at the foundation of the rule ; and as a punishment for his fraud, the law deprives him and all claiming under him of all remedy upon it.

The question in this case depends upon entirely different principles. Here is no fraud to be punished, for the party entitled to the benefit of the paper, and the only one ever having a legal interest in it, has neither done or intended any wrong. At the time the seals were affixed, there was no agreement to be altered,

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for none had been made; none perfect in either form or substance had even been written—much less delivered or taken effect.

Assuming Culbertson to have affixed the seals, while the skeleton remained in his hands, it was done by one having no rights under the instrument, and, neither at that time or ever afterward, any remedy or right of action upon it. In respect to the custody, filling up, and ultimate delivery of the instrument to the payee, he was acting, not only for himself, but as the authorized agent of Fullerton; clothed with apparent authority to bind Fullerton for any sum that he might see fit to insert, and to make the instrument perfect, in every respect, for the purposes intended, *where [537 Fullerton had left it imperfect. He had no right to change what Fullerton had done for himself; but he had perfect authority to supply what Fullerton had omitted. If he did more than the authority given him by Fullerton seemed to authorize, he failed to bind him for such excess, even in favor of one who might in good faith take the paper.

But if he did it fraudulently, it is still but the fraud of Fullerton's agent, acting outside of his authority, and, therefore, in the legal sense, a stranger to both him and Sturges. He is a stranger to Fullerton, because *quoad* the excess, he has acted without authority; and he is a stranger to Sturges because, as between him and Fullerton, he has derived no title to the instrument through or from Culbertson. But it would indeed be singular that Sturges should be punished for the fraudulent or unauthorized act of Culbertson, for whom he was in nowise responsible, and of which he had no knowledge; rather than Fullerton, whose agent he was, and who had incautiously or negligently placed in his hands the means that enabled him to obtain the money. There is not a word in the case that points to any bad faith on the part of Sturges; and therefore nothing that could justify visiting him with the loss of his debt, as a penalty for his conduct. If he must lose, it is because Culbertson has exceeded the authority given by Fullerton, and, for that reason, failed to bind him. It is a simple question of agency, and a settled rule of the law of agency furnishes the solution. What Culbertson has done, is exactly what Sturges had a right to suppose him authorized to do, except the addition of the seal. But without the seal the instrument is perfect, and a full execution of the power. When that is the case, and the party dealing with the agent has acted in good faith, his acts are binding so far as they are author-

Fullerton v. Sturges.

ized, and void only for the excess ; provided the boundaries between the excess and the rightful execution are clearly distinguishable. The rule is thus stated by Lord Coke : "Regularly, it is true that, where a man doth less than the commandment or authority com- 538] mitted unto him, then the commandment *or authority being not pursued, the act is void. And where a man doeth that which he is authorized to do and more, there it is good for that which is warranted, and void for the rest." Co. Litt. 258a.

The same principle is stated by Mr. Justice Story, and supported with a large number of authorities. Story on Agency, sec. 466, *et seq.* He says : "Where there is a complete execution of the authority, and something *ex abundanti* is added which is improper, there the execution is good, and the excess only is void. But where there is not a complete execution of a power, or where the boundaries between the excess and the rightful execution are not distinguishable, then the whole will be void." It is true, that most of the cases cited involved attempts by the agent to bind the principal to the performance of something more or less than was authorized ; but surely the application of the principle can not be more doubtful where the excess relates to a mere useless formality in the execution of the instrument that evidences the contract, binding the principal to precisely what he had authorized the agent to do.

But the precise point has been adjudicated. It is impossible to distinguish the case from that of the United States v. Linn et al., 1 How. 104, decided by the Supreme Court of the United States. The action was brought upon the undertaking of Linn, as receiver of public moneys at Vandalia, Illinois. Duncan, one of his sureties, pleaded that, after he had signed the instrument and delivered it to Linn, to be transmitted to the plaintiffs, it was, without his consent, direction, or authority, materially altered by affixing a seal to his signature. The court sustained a demurrer to this plea, because it did not show that the seal was added with the knowledge, consent, or authority of the plaintiffs. The court say : "The plea not alleging by whom the seals were affixed, it is open to two intendments. Either that this was made by the plaintiffs, which would make the instrument void, or that it was done by a stranger, which 539] would not invalidate *it." They then proceed to apply the rule that requires the pleading to be construed most strongly against the party alleging it ; and arrive at the conclusion, that if "the plea had concluded with a verification, and the plaintiffs had replied that

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the affixing the seal was done without their knowledge, consent, or authority, and this state of the case had been sustained by the proof, it would not have avoided the instrument.

The plea in that case, contained precisely what the proof shows in this; what was reached by intendment there, is positively admitted here, namely, that the alteration was made without the knowledge, consent, or participation of the plaintiff; without which, we have the authority of that court for saying, the instrument is not avoided. The doctrine was carried still further, and, perhaps, to an unwarrantable length, in *Truett v. Wainright*, 4 Gil. 411; where the addition of a seal by an agent, to the signature of the party to a warrant of attorney, with the knowledge and at the request of the attorney of the adverse party, was held not to vitiate the instrument. The court place the decision upon the ground that the instrument was sufficient without the seal, and could not be avoided by the unnecessary addition of it, without authority on the part of the agent.

The judgment must be affirmed.

WASHINGTON MATTHEWS v. THE STATE OF OHIO.

It is essential that an indictment for robbery should contain a substantial averment of *the intent to steal or rob*.

And this averment is not sufficiently made by the words, "*feloniously did seize, take, and carry away*."

WRIT of error to the court of common pleas of Butler county.

*At the September term of the court of common pleas of [540] Butler county, 1854, the plaintiff in error was put upon his trial, on an indictment containing four counts, the first of which charged, *an assault with intent to murder*; the second, *an assault with intent to rob*; and the third and fourth counts, respectively, *a robbery*, under section 15 of the statute for the punishment of crimes. After the close of the evidence, a *nolle prosequi* was entered on the first two counts, and the cause having regularly gone to the jury, the defendant was found guilty on the last two counts of the indictment, on which judgment was rendered, and the plaintiff in error sen-

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tenced to imprisonment in the penitentiary for the term of three years. To reverse this judgment, this writ of error is prosecuted.

Clark & Christy, and *Alex. F. Hume*, for plaintiff in error.

G. W. McCook, attorney-general, for the state.

BARTLEY, J. The first error assigned is, that the indictment is defective in this, that it is not averred, in either of the two counts on which the plaintiff in error was convicted, that the taking of the property therein alleged, was done *with intent to rob or steal*.

The language of the section of the statute, under which these two counts of the indictment were framed, is as follows :

"That if any person shall, forcibly and by violence, or by putting in fear, take from the person of another any money or personal property, of any value whatever, *with intent to rob or steal*, every person so offending shall be deemed guilty of robbery," etc.

Three ingredients are essential to constitute the crime of robbery :

1. The use of force and violence, or the use of means whereby the injured person is put in fear ;

2. A taking from the person of another of money, or other personal property ;

541] *3. An intent to rob or steal.

All these elements are essential, and each must exist in order to constitute the crime. The *first* and *second*, without the *third*, would be a simple trespass ; the *third*, without the *first* and *second*, would be a bare *intent* to commit a crime without the overt act ; and the *second* and *third*, without the *first*, would be a simple larceny.

In the case under consideration, the *corpus delicti* is averred, in the two counts of the indictment on which the plaintiff in error was convicted, as follows :

"3. . . . Washington Matthews, . . . on the seventh day of August, in the year 1854, . . . in the county of Butler, . . . in and upon the said Owen McArdle, . . . feloniously did make an assault, and him, the said Owen McArdle, by violence, in bodily fear and danger of his life, . . . then and there feloniously did put ; and three twenty-dollar gold pieces, of the value of twenty dollars each, of the personal property of the said Owen McArdle, from the person and against the will of the said Owen

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McArdle, . . . , then and there feloniously and violently did seize, take, and carry away, contrary," etc.

"4. . . . Washington Matthews, . . . on the seventh day of August, in the year 1854, . . . in the county of Butler, . . . in and upon the said Owen McArdle, . . . did unlawfully make an assault, and him, the said Owen McArdle, in bodily fear and danger of his life, . . . then and there feloniously did put; and three twenty-dollar gold coins, of the value of twenty dollars each, of the personal property of the said Owen McArdle, from the person and against the will of the said Owen McArdle, . . . then and there feloniously and violently did seize, take, and carry away, contrary," etc.

The first two constituents of the crime are sufficiently set out in each of these counts; but the proper averment of the *intent* *is omitted. Whenever a particular intent constitutes an [542 element of a crime, it is essential that it be substantially averred in the indictment. It is true that in the case of *Turner v. The State of Ohio*, 1 Ohio St. 422, it was held, that where an indictment for robbery avers an *actual stealing*, the requisite intent is, *ex vi termini*, included, the term *steal*, in its legal signification, importing a larceny. But the words of this indictment, "*did seize, take, and carry away*," import a trespass, but do not express a larceny. And the deficiency is not helped by the word "*feloniously*" which is used. The predicate of an act that it is *felonious*, is simply to assert a legal conclusion as to a quality of the act; and unless the act charged of *itself* imports a felony, it is not made so by the application of this epithet. Indeed, the term *felony* has no distinct and well-defined meaning applicable to our system of criminal jurisprudence. In England, it has a well-known and extensive signification, and comprises every species of crime which, at common law, worked a forfeiture of goods and lands. But under our criminal code, the word *felonious*, although occasionally used, expresses a signification no less vague and indefinite than the word *criminal*.

Both of the counts of the indictment therefore upon which the plaintiff in error was convicted, are fatally defective. Other errors are assigned, but it is not necessary to go further in this case.

Judgment of common pleas reversed, and cause remanded.

WILLIAM SATCHELL v. THOMAS DORAM.

No statute has authorized the recording of town-plats not executed and acknowledged pursuant to statute, and, consequently, such record is not, *per se*, evidence. Nor is it made evidence by proof that, in building or improving, some lot-owners paid respect to the plat, and others not.

543] *An averment in a declaration that the plaintiff was entitled to the use of a "public alley," is not supported by proof of a right to use a *private* alley, A deed calling for an alley at seventy feet, more or less, from a street, does not estop the grantee to deny the existence of an alley at the distance of sixty feet.

Whether a court errs, or not, in a charge to a jury, is immaterial, where there is no evidence tending to make the charge material and it could not have misled the jury.

ERROR to the district court of Hamilton county.

The judgment sought to be reversed in this proceeding is that of the district court, affirming a judgment of the court of common pleas of Hamilton county, in an action on the case, in which the plaintiff in error was also plaintiff, and the defendant in error was defendant.

The declaration averred, that "whereas, on the 10th day of January, in the year 1845, and during," etc., Satchell "was lawfully possessed of a certain dwelling-house and appurtenances, situate on the south side of Green street, between Race and Elm streets, in the city of Cincinnati," etc., and "was lawfully entitled to the use and enjoyment of a certain public alley, extending from said Green street, of the width of seven feet, by the side of his said dwelling-house, the whole length, of the said William Satchell, situate as aforesaid;" and alleges the obstruction of the alley by the defendant. The defendant plead not guilty, and also that the plaintiff ought not to have his action, because, he says "that, by reason of the plaintiff's possession of the lot in the declaration mentioned, at the time therein stated, the plaintiff was not entitled to the use and enjoyment of the said supposed alley, as in the declaration set forth; and this he prays may be inquired of by the country," etc.

It appears from the bill of exceptions, that the plaintiff introduced evidence tending to prove that, in 1838, Doram had a stable

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on the back end of his lot; that, then, in a conversation with one Beckley, Doram said he had been informed by Gest, city *sur- [544 veyor, that there was an alley laid off, in connection with the alley "across on the other side of the street, and parallel with it," and that he (Doram) did not want to move his stable farther east than it then was, because, if he did so, the street commissioners would fine him severely for doing so, and that he had sixty feet, more or less, from Mr. Longworth.

Evidence was further introduced tending to prove, that, at the commencement of the suit, and at the time stated in the declaration, Doram was in possession of a lot, and house thereon situate, on the southeast corner of Green and Elm streets, in McFarland's subdivision of said city; that he (Doram) obtained that property about thirty years ago, by assignment of Nicholas Longworth's title-bond to one Hurry; that afterward (December 19, 1835) Doram obtained from Longworth a deed in fee simple; that the plaintiff is in possession of the lot, with his dwelling-house thereon, next east on Green street—street of Doram's lot—and that Doram told said Beckley that Mr. Gest, the city surveyor, had told him there was an alley there.

Plaintiff further introduced evidence tending to prove that, about 1807 or 1808, William McFarland had possession of that part of said city known as McFarland's subdivision; that he subdivided the same into lots, so that in said subdivision there were alleys seven feet wide, the first at the distance of sixty feet east, from Elm street, and then of distances of every sixty feet on both sides of Green street to Race street; that the lots are thirty feet in width; that about August '17, 1831, Charles Satchell was about to purchase the right of one Joseph Parker, which he held by title-bond from Longworth, and that Doram, as the agent of Parker, held his papers and negotiated the contract with said Charles Satchell; that, in such negotiation, Doram told said Charles S., that there was an alley sixty feet east of Elm street, in the rear of said lot, which said Charles was about to purchase, and further, at the time of such negotiation, showed Charles S. the now mutilated paper, of which the following only is legible: "N. Longworth [545 sells to Joseph Parker a lot on the east side of Elm street between 2d and 3d streets, next south of Thomas Dorand, twenty feet in front and running back to the alley sixty or seventy feet, price forty dollars per front foot, payable in 2, 3, 4, 5, 6, 7, 8, 9, and 10

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years, equal installments, with interest yearly, on condition" —.† It was further proven, that Charles Satchell's lot, purchased after the conversation referred to, is next south on Elm street of the lot of Doram.

Plaintiff also introduced evidence, tending to prove that Longworth at one time owned lots number 25 and 26, and other lots, in McFarland's subdivision, and that about eight or ten years ago, he went to look after some property of his in that neighborhood, and then found Doram in possession of five or six feet of ground next south on Elm street in addition to the part conveyed by Longworth's deed to Doram, the latter having a porch on it; that Doram then told Longworth, that G., the city surveyor, in surveying his lot, had found that the line did not extend back seventy feet, and had given him that piece of ground to make up for the deficiency; to which Longworth answered, that the surveyor was not his agent, and that he (L.) would hold Doram to the original lines of his lot.

Plaintiff further introduced Longworth as a witness, whose testimony tended to prove that he had seen in the record of deeds of said county, a copy of a plat of McFarland's subdivision of the city of Cincinnati; and that the buildings and improvements in that part of the city have been made to correspond with and in conformity to the said plat of subdivision; that he had never seen what he believed to be the original plat of McFarland's subdivision, but, within two or three years past, he had seen some one claiming to be an heir or agent of McFarland, who was trying to get money out of people, and had what he claimed to be the original plat of said subdivision.

546] *Evidence was further introduced by plaintiff, tending to prove, that on the north side of Green street (now called Pearl street), two alleys are open and have never been closed, and that the other alleys on both sides of the street, have, by consent of the parties who occupy the adjoining lots, been divided between them, and some of them have gates at each end to keep the hogs out, and that of the space or alley in question, about $3\frac{1}{2}$ feet yet remains open from Green street about 12 feet, that then, for about six feet a fence of Doram's projects about one foot more to the line of

†On this paper are certain indorsements of transfer, by way of security and otherwise, which are not material to be stated.

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Charles Satchell's lot, where the space yet remains about seven feet wide till it comes to a stable built by one Franklin.

Evidence was further introduced by plaintiff, tending to prove that about ten years ago, Charles Satchell's lot was fenced in, and that in the rear or east side of said lot, he had a gate opening out on the space now claimed as an alley, and through which himself and his family and his tenants in said dwelling-house passed at their pleasure, and that he and his tenants from time to time received their fuel and other heavy articles from wagons in the rear of his lot, and that there was a space not built upon then, in the rear of said lot, independent of the space for the alley; that the said Charles Satchell's fence was sixty feet east of the street; that he had had his lot measured by the city surveyor, and it was found to be at that distance from Elm street; that the fence was a board one, and the fence on the east line of Doram's lot was a continuation of the same fence and on the same line; that afterward Doram built a cow-house in place of the pig-pens which were there before, for a cow which died last summer (the life of a cow being about ten years), and that said cow-house was built outside and east of said fence, and so remained there till it fell down when William Satchell, the plaintiff, dug his cellar for his house.

The original deed of Longworth, together with a certified copy of the same from the records, was put in evidence without objection. The description is as follows: "The following described [547] lot of ground in the city of Cincinnati, to wit, commencing on the east side of Elm street at the southeast corner of said Elm and Green streets; thence south along the east side of Elm street twenty (20) feet; thence east on a line parallel with Green street seventy (70) feet, more or less, to the alley; thence north parallel with Elm street (20) twenty feet, to Green street; thence west along the south side of Green street (70) seventy feet, more or less, to the place of beginning, being parts of lots Nos. 25 and 26 in the plan of subdivision made by William McFarland in Cincinnati." This deed appears to have been recorded in June, 1807.

After the admission of this deed in evidence, the plaintiff offered a paper and certificate as follows:

William McFarland's Plat of Addition to Cincinnati.—"A plan of the division of six lots situate, lying, and being in the town of Cincinnati, in the county of Hamilton, and State of Ohio, and numbered on the original plan of the said town of Cincinnati, two hun-

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dred and fifty-seven, two hundred and fifty-eight, two hundred and fifty-nine, two hundred and eighty-two, two hundred and eighty-three, and two hundred and eighty-four; which lots, according to this plan, are divided into thirty-six lots, each lot being thirty feet in front and seventy-two feet and one-third of a foot deep, the number of which will appear by this plan, with two streets, each forty feet wide, running eastwardly and westwardly, and five alleys passing through the said plan, northwardly and westwardly, each alley being seven feet wide; which streets and alleys are to continue for the use of the proprietors of the said lots forever.

"Delivered by William McFarland."

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*E L M S T R E E T .

[548

1	2	24	23	25	26
3	4	22	21	27	28
5	6	20	19	29	30
Academy. 7	8	18	17	31	32
9	10	16	15	33	34
11	12	14	13	35	36

T H I R D S T R E E T .

U N I O N S T R E E T .

Square No. 1.

G R E E N S T R E E T .

R A C E S T R E E T .

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549] **State of Ohio, Hamilton County, ss :*

"I, William Hoon, recorder of said county, do hereby certify that the foregoing is a correct copy, taken from book G, page 321, of the records of said county.

"In testimony whereof, I have hereto set my hand and official seal, this 21st [—], 1851.

[SEAL.]

"WILLIAM HOON,

"Recorder of Hamilton County, Ohio."

This supposed plan appears to have been recorded in book G (an early book of Hamilton county records). It was rejected by the court below, to which plaintiff excepted.

The plaintiff then offered the book of records itself (book G, page 321), which was also rejected by the court.

(The deed to Charles Satchell conveys a lot described as "all that certain lot in Cincinnati, on the east side of Thomas Doram's lot, deeded to him by said Longworth [said Doram's being the corner of Green and Elm streets]. The lot now conveyed is twenty feet in front on Elm street and runs back to the alley sixty feet.")

The defendant introduced James Miles and other witnesses, who testified that there was no alley at the east end of said Doram's lot, which testimony the plaintiff moved the court to overrule, but the court denied the motion, and received the evidence.

Under the provisions of the then statute, the plaintiff's counsel demanded a written charge, which was given as follows :

"The issue in this case may be stated as follows: The plaintiff claims that there was, before and at the time of commencing this suit (that is to say, on the 23d day of April, in the year 1846), a certain public alley, to the use of which he was entitled, running beside premises of which he was possessed, and that, for some time previously, the defendant unlawfully obstructed the said public alley to the damage of the plaintiff. The defendant by his pleas substantially denies all these allegations, and you are to say whether the plaintiff has established his claim, and if so, what are his damages. In the first place, then, was there at the time mentioned in the declaration, or at any time before the commencement of the suit, such a public alley? Proof that there was a private alley will not satisfy the plaintiff's allegations; that is, proof of an alley provided for the use of adjoining proprietors of lots, is not proof of a public alley. As to the proper proof of the existence of such a public alley, we have to say, in general terms, that it must

be such as to establish: 1. A legal dedication as provided by statute. 2. A condemnation by some public authority competent for the purpose. 3. A dedication implied from acts of the owner, not amounting to a statutory dedication, but indicating the purpose to make a public alley; or, 4. A continuous and adverse possession and user on the part of the public for twenty-one years. And,

"1. As to a statutory dedication. Do you find, from the evidence, that a plat has been made, acknowledged, and recorded, as provided by an act entitled 'an act to provide for the recording of town-plats,' passed March 3, 1831; or that there has been a dedication by the proprietor of the land at any time, according to the provisions of the statute then in force? Has any plat been admitted in evidence by the court? or, if not, is the defendant estopped from denying the existence of such an alley, by the recitals in his deed? We charge you, that, as to any person purchasing on the east of plaintiff's lot on the south side of Green street, the defendant is estopped from denying that there was, at the date of his deed, a public alley about seventy feet east of his Elm street corner, but that his deed does not admit the existence of an alley at the distance of sixty feet east of the Elm street corner, unless you find that there was, in fact, an alley laid out by means such as we have mentioned, or used as such at the date of the deed; for, if there was such an alley *in fact*, the actual location will govern, and the deed would only convey to the line of that alley.

"2. Has there been a condemnation?

"3. If you do not find that there has been a statutory dedication, *do you find that any person, while the owner of the [55] ground, opened it to the public, or passively permitted the public to use it as a public alley for the space of several years? Was this space of ground next the plaintiff's premises ever opened and used by the public as an alley? This is a simple question of fact.

"4. Has the public acquired a title to the alley by continued user for twenty-one years, without the permission or sufferance of the plaintiff? This also is a simple question of fact.

"We would here explain that, by the recital in the defendant's deed, he is estopped from denying that there was, at the date of that deed, a public alley at the distance of about seventy feet from the Elm street corner of defendant's lot, and that this estoppel will apply to all the cases of dedication to which we have called your attention, that is, it will practically warrant you in finding,

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that there was a public alley, however established ; but you must remember that this applies only to the time when the defendant received his deed, and to the point of space we have mentioned—that is, at the line of the lot extending about seventy feet eastwardly from Elm street, and does not apply to an alley sixty feet eastwardly from Elm street. If you find that there was, at any time, a public alley at the point claimed by the plaintiff, that is, at the side of his dwelling house, the presumption is that it continues to exist, unless the contrary appears from the testimony. The defendant claims that, for more than twenty-one years previously to the commencement of this suit, he was in the continued, uninterrupted, and adverse possession of the ground he is said to have obstructed. If so, he is not liable in this action. But his possession must have been continued and uninterrupted ; that is to say, it must never have been abandoned or lost during twenty-one years of adverse possession. If, during any part of the twenty-one years, the defendant ceased to occupy or control the premises, you must calculate from the date of the last interruption. But, we repeat, before you are required to examine the question of the 552] defendant's possession, you must be satisfied that *there has been, at some time, a public alley running by the side of the plaintiff's house. If you find that there was such an alley, did the defendant obstruct it? If so, what were the circumstances of injury to the plaintiff, and what was the damage to him, looking at the nature of the obstruction and all the particulars of the injury? If there was no such alley, or if the defendant obstructed none such, of course your verdict must be for the defendant."

The defendant moved the court to charge the jury, "That the parol admissions of the defendant to other persons than the plaintiff as to the fact that there was an alley in existence, do not prove that any alley was ever dedicated or condemned. Such admissions are only evidence tending to prove user, and they do not control the testimony upon that subject; and admissions of the existence of an alley, generally, do not avail, unless the location of the alley be established by proof, and found to correspond with the declaration." The court further charged: "We decline to give this charge as asked; but we give, in lieu of it—That the parol declarations of the defendant to any person who did not act upon the faith of those declarations, do not prove a statutory dedication or condemnation, even as verbal declarations of the existence of

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an alley, if made to persons who did not act upon the faith of them, are evidence of user only, or dedication less than formal or statutory; and defendant's admissions of the fact of the existence of an alley, generally, are always competent, if shown to refer to the alley in question." To which the plaintiff excepted.

The verdict being for defendant, plaintiff moved for a new trial. That motion being overruled, and judgment entered on the verdict, a writ of error was sued out of the district court. That court affirmed the judgment of the common pleas. The plaintiff now seeks to reverse the judgment of affirmance.

John Joliffe, for plaintiff in error.

Pugh & Pendleton, for defendant in error.

*RANNEY, J. It is quite unnecessary to extend this report, [553 by assigning the reasons, at length, in support of the ruling of the court below. It is enough to say, that those rulings have been carefully examined by us, and, so far as they are in any way material in this case, we are entirely satisfied of their general correctness.

The grounds upon which those rulings were placed, will be found fully presented in the charge of the court below.

The judgment is affirmed.

STATE (EX REL. ATTORNEY-GENERAL) v. JOSEPH C. TOOL.

Where a treasurer elect, on the first Monday of June next after his election, executed and delivered a bond to the commissioners of the county with sufficient surety, according to the statute, and the commissioners on that day neither accepted nor rejected the bond, but on the next day approved it, and the treasurer immediately thereafter took the necessary oath, and had the same indorsed on the bond, he thereby became the legal treasurer of the county.

PROCEEDINGS in the nature of a *quo warranto*.

The case is stated in the opinion of the court.

F. D. Kimball, attorney-general, for the state:

The first question presented by the demurrer to the second plea

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is, is the mere presentation of a bond to the county commissioners on the day limited by statute, a sufficient compliance therewith, to prevent the office becoming vacant. The provision of the statute (Swan 1009) is, that if any person elected to the office of county treasurer, shall not give bond and take the oath or affirmation as required by the preceding section (section 2), *on or before* the first 554] Monday in June next after his election, his *office shall be considered vacant. The requirements of section 2 are that he should give bond, with four or more freehold securities, *to the acceptance* of the county commissioners, etc., and shall also take and subscribe an oath or affirmation, to be indorsed on said bond that he will faithfully discharge all the duties of his office, etc.

The provisions of the law are imperative, that unless the bond is given and the oath or affirmation taken on or before the day prescribed, the office shall be considered vacant. There is no qualification whatever, but the failure to comply with these requirements leaves the individual in the same position precisely as if he had never been elected.

It is contended by counsel for defendant, that the bond was *given* on the day prescribed. The provision of the statute is that he shall give bond *to the acceptance* of the county commissioners. In this case no bond was given on that day to the acceptance of the commissioners, and the provision of section 3 is, that in case of a failure to give bond and take the oath as required by section 2, the office shall be considered vacant.

The attempt to give a bond will not excuse the giving it to the *acceptance* of the commissioners, and in such a case will it not be presumed that the commissioners acted in good faith and according to the discretion vested in them, in not accepting it on that day; in other words, that no such bond was presented as is required by law, or that it would have been on that day accepted? The taking the oath of office is the voluntary act of the individual himself, and is subject to no conditions of acceptance from any source. It may be taken, and indorsed on the bond just as well before as after its acceptance by the commissioners, and the failure to take it is the neglect of the individual himself, and stands entirely disconnected from the act of giving a bond to the acceptance of the commissioners.

The question whether the bond thus given and accepted on a day subsequent to the one prescribed by law, is binding and valid,

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*is entirely different from the one involved in this case, and [555 such distinction is distinctly made in the case of Findley v. Ohio, 10 Ohio, 59. The acts of a treasurer *de facto* are valid, and his sureties may be bound, but the question here presented is, is Tool treasurer *de jure*, after having failed to comply with the law in regard to his qualification and induction into office?

Hunter & Dougherty, for defendant:

The material facts averred in the second plea are, "that the defendant, being duly elected to the office of county treasurer, delivered to the county commissioners, on the first Monday of June thereafter, his bond, with sureties conditioned according to law, and was ready and willing on that day, on acceptance by the commissioners of the bond, to take and subscribe the oath of office to be written on the bond as required by law. That the commissioners, without determining on the validity of said bond, on said first Monday, adjourned their session to the next day, and on that day approved and accepted said bond as the official bond of the defendant, and that the defendant thereupon on that day took and subscribed the oath of office indorsed on said bond, and holds the office accordingly."

The questions are: 1. Whether the *acceptance* of the bond on the next day after the first Monday, under the circumstances, was in time to prevent the office from becoming vacant? and, 2. Whether the failure of the defendant to take and subscribe the oath of office on the first Monday rendered the office vacant?

Section 3 of the act provides: "That if any person elected to the office of county treasurer shall not give bond and take the oath or affirmation, as required in the preceding section, on or before the first Monday of June next after his election, his office shall be considered vacant." Swan's Stat. 1009.

The bond was duly executed and delivered on the first Monday of June by the defendant. He had done all that was in *his* *power to do, without the concurring action of the commis- [556 sioners; and if so, surely the statute ought not to be so construed as to forfeit his right to the office, or to defeat the election by the people, by either a wanton refusal or negligent omission of the commissioners to approve and accept the bond.

That would be a harsh, unwise, and an unjust provision, if it were so expressly provided in the law. But it is not so provided;

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and if that interpretation be given, it must be by construction. The language is, "That if any *person elected*," etc., "shall not *give bond*," etc. It is his act alone of negligence that is in contemplation; and by no means the omission or negligence of the commissioners in not acting upon his bond that is intended to vacate the office. If the defendant, with sureties, etc., *executed* and *delivered* his bond to the commissioners, he had, in the full sense of the law, "given bond," provided the sureties, condition, and amount of the penalty of the bond were such as the commissioners would accept and approve; and the averments of the plea are, that the bond was in fact accepted and approved the next day.

This being the case, we say the office can not, in the language of the statute, "be considered vacant," for the reason that the defendant did not *give* bond. He *gave* the bond in due time, and the commissioners accepted it. It is therefore a good bond, and is obligatory upon the defendant and his sureties in it for the performance of its condition. *Ohio v. Findley*, 10 Ohio, 51.

Is the office vacant because the oath was not taken and indorsed upon the bond on the first Monday of June? The defendant has, in virtue of his election and the bond and oath, as made and given, exercised the office to the present time, and a question might, if he were unfaithful, arise, whether his sureties would be liable on the bond. This question has been distinctly adjudicated in the *Findley* case just cited. Nevertheless, it may be argued, that although the bond is valid, the office is vacant.

We think, however, that if the oath of office was taken and 557] *indorsed upon the bond and subscribed by the defendant, without unnecessary delay, after the bond became a bond in law by being accepted by the commissioners, the statute has been complied with by the defendant, so far as it was in his power to comply with it under the circumstances. The oath is to be indorsed on the bond—not on a paper which may *afterward* become a bond. If indorsed before acceptance, it would not, at least till accepted, be on the official bond. In their due chronological order, the bond should exist before the oath of office could be indorsed upon it. And in this case, the bond being delayed in being made perfect by the action, or want of action, of the commissioners, the oath was, *ex necessitate*, and for the same reason, delayed by this want of action.

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KENNON, J. These proceedings were instituted by the state for the purpose of ousting the defendant from the office of treasurer of Hocking county.

The defendant, in showing by what authority he held the office and exercised the duties of county treasurer, plead: 1. That at the October election of 1854, he was duly elected treasurer of Hocking county; that on the first Monday of June, 1855, he executed a bond, with more than four freehold sureties, to the acceptance of the commissioners of the county, in a sum prescribed by the commissioners; that he then and there took the oath prescribed by law, subscribed the same, and caused it to be indorsed on the bond according to law, and, therefore, that he lawfully exercises the duties of the office of county treasurer. 2. That on the first Monday of June, 1855, he executed and delivered to the commissioners for their acceptance, a bond conditioned according to law, in the penal sum of \$80,000, with twenty-four freehold sureties; that the commissioners, on said first day of June, 1855, neither accepted nor rejected the bond, but continued their session until the next day, being the next day after the said first Monday of June, 1855, and then and there accepted and *approved of [558 said bond; that the said Tool then and there, on the same day, took and subscribed the oath required by the state, and caused the same to be indorsed on the bond thus accepted by the commissioners. On the first plea the state took issue, and to the second filed a demurrer.

The question presented for our consideration is, whether this second plea is sufficient. This depends upon the construction to be put on the statute.

Section 2, of the act prescribing the duties of county treasurer, is in these words: "That each county treasurer, previous to entering on the duties of his office, shall give bond, with four or more freehold securities, to the acceptance of the county commissioners, and in such sum as said commissioners shall direct, payable to the State of Ohio, and conditioned for the paying over, according to law, all moneys which shall come into his hands for state, county, township, or other purposes; and shall also take and subscribe an oath or affirmation, to be indorsed on said bond, that he will faithfully discharge all the duties of his office; and the said bond, so indorsed, shall be deposited with the auditor of the county, and be by him carefully preserved."

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Section 3 provides, that if any person elected to the office of county treasurer, shall not give bond and take the oath or affirmation, as required in the preceding section, on or before the first Monday in June next following his election, his office shall be considered vacant.

By section 60 of the same chapter (Swan's Stat. 1017), it is made the duty of the county commissioners, in case the office of county treasurer shall become vacant by death, removal, resignation, neglect to give bond, or from any other cause, to fill the vacancy forthwith by some suitable person.

This bond was not accepted by the commissioners on the first Monday of June next after the election, nor was the oath, required by the statute, taken and subscribed, nor was it indorsed on the bond, on or before the first Monday of June.

559] *The bond was executed and delivered to the commissioners, for their acceptance, within the time prescribed by law, but was neither accepted nor rejected on that day; but on the next day, and during the regular June session of the commissioners, was accepted and approved by them. Now, if a good and sufficient bond, executed according to law, with the oath of the treasurer executed thereon as prescribed by the statute, had been presented to the commissioners at the March term, 1855, and they had not acted on the bond until the day after the first Monday of June, 1855, and then approved the same, it could scarcely be contended that the treasurer would be deprived of his office. The treasurer, in such case, would have done all that the law required of him to do; and it would, to say the least of it, be strange if, by the neglect of the commissioners, he was not only deprived of his office, but the commissioners themselves thereby acquire the power of appointing another in his place.

In such case, the doctrine of relation would apply, and the acceptance, by the commissioners, of the bond on the next day, would relate back to the time of the delivery of the bond to the commissioners for their acceptance.

It is said, in 18 Viner's Abridgment, 290, that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation.

The instances in which the doctrine of relation applies are very numerous.

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The deed of a sheriff relates back to the day of sale, and has the same effect as if executed on the day of sale, provided the interests of third persons are not injuriously affected thereby. Vide *Jackson v. McCall*, 3 Cow. 75, and the authorities cited in the opinion of the court.

So, where a deed is delivered as an escrow to a third person, to be delivered upon a condition to be performed, and the condition is afterward performed and the deed delivered, this last *de- 560 livery shall, by relation, operate back and take effect from the first delivery, although the grantor die in the meantime, between the first and second delivery. Vide *Viner*, title Relation, p. 290.

In the case supposed, the presentation of the bond on the first Monday in June, with the oath indorsed thereon, and the acceptance by the commissioners, are, in the sense in which the word concurrent is used by *Viner*, concurrent acts, and the acceptances shall relate back to the first Monday of June, and the whole be considered as having been done on that day; although, in point of fact, the acceptance was made and entered by the commissioners on the day after the first Monday of June.

But, in this cause, the oath was not made or subscribed by the treasurer, nor indorsed on the bond, until the next day after the time prescribed by law; and therefore, it is claimed, the office became vacant, and the present incumbent should be removed. But we think, by a fair reading of the statute, the oath and indorsement follow the acceptance, and do not necessarily precede it. The subscribed oath is to be indorsed on the bond, the accepted bond, and, in the natural chronological order of things, the execution and the acceptance of the bond, the oath and the indorsement, follow each other; indeed, the very word bond, means that it has been delivered to, and accepted by, the commissioners. And although, if the oath had been indorsed on the bond at the time it was presented to the commissioners, the law would have been complied with; still, we think the indorsement of the oath more properly follows the acceptance, and if made immediately after the acceptance, that the oath, indorsement, and the acceptance will have relation to the time of the first act of the treasurer, viz., the delivery of the bond to the commissioners for their acceptance, and that this original act shall, in the language of *Viner*, be preferred; and to this first act the others shall have relation, and, by this fiction, the whole shall be considered as done on or before the first Monday of June.

Proceedings dismissed.

561] *JAMES G. CASE v. GEORGE WRESLER, TREASURER OF SCOTT TOWNSHIP, BROWN COUNTY.

The board of education of a township, acting upon the supposition that the local directors of a subdistrict were neglecting to discharge their duties, assumed the exercise of those duties, under the provisions of section 13 of the school law, and employed a teacher for said subdistrict; who, under that retainer, and without being notified by the local directors to desist, taught the school in said subdistrict for three months, and at the expiration thereof received from the clerk of the board of education an order upon the township treasurer for his wages, pursuant to section 24 of said act. *Held—*
[That the treasurer could not rightfully withhold payment of said order, upon the ground that the local directors had not been neglectful of their duties, and that the exercise thereof, by the board of education, was unwarranted by the facts of the case.

MANDAMUS.

The facts sufficiently appear in the opinion of the court.

King, Smith & Wheeler, for plaintiff.

William Wall, for defendant.

THURMAN, C. J. An alternative writ of mandamus was issued in this case, commanding the defendant to pay to the plaintiff \$35.69, for services rendered by him as a teacher of a common school in sub-district No. 1, Scott township, Brown county, as ordered by the board of education of the township, or to show cause why he refuses to do so.

To this writ the defendant has answered; and the cause is submitted to us for decision upon the writ, answer, and the order of the board of education, directing the payment of the money, which is the only evidence offered in the case.

As the order, with the admission of the defendant that he has refused, and yet refuses to pay it, although when it was presented
562] *he had sufficient funds to do so, makes a *prima facie* case for the plaintiff, to rebut which the defendant has offered no proof whatever, it follows that a peremptory writ must be awarded; for the *onus probandi* in relation to the matters of justification set up in the answer, rests upon the defendant.

But, inasmuch as the case has been argued as if the allegations of

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the answer were true, it may be proper to say, that were they proved, the result would be the same.

The material facts as alleged, when briefly stated, are as follows: The board of education—acting upon a real or pretended supposition that the local directors of the subdistrict were neglecting to discharge their duties—assumed the exercise of those duties, under the provisions of section 13 of the school law (Swan's new Stat. 839), and employed the plaintiff to teach a school in the subdistrict; which he did for three months, without being notified by the local directors to desist. At the expiration of that time the board of education gave him the above-mentioned order on the defendant for his wages, pursuant to section 24 of the act. The local directors notified the defendant not to pay it, and threatened him with a suit if he did, whereupon he refused to pay it. The ground of the notification was, that the local directors had not neglected their duties, and that, therefore, the board of education had unlawfully usurped their authority.

Assuming that the elaborate history set forth in the answer is true, it is by no means certain that the board of education was justified in superseding the directors; while it is very apparent that the defendant has not been actuated by any bad motive.

But is this enough? Must the plaintiff be a sufferer from the dissensions of these officials, of which it nowhere appears that he had any notice until payment of his wages was refused? We do not think so. It may well be admitted, that to be entitled to payment for services rendered, the retainer must have been by competent authority; but here the retainer was by a board *exercising [563 *de facto* the powers of local directors, without any objection, made known to the plaintiff, against their so doing. Under such circumstances, we think he is entitled to payment of his order, and that he ought not to be turned around to sue the individuals composing the board.

This view of the case makes it unnecessary to consider whether a treasurer would, in any case, be justified in looking behind the order drawn on him by the board of education.

Peremptory mandamus awarded.

Parker v. State of Ohio.

AMOS PARKER v. STATE OF OHIO.

An information charging the defendant with selling intoxicating liquors to A, a person who then and for a long time had been in the habit of getting intoxicated, which habit was then and there well known to the defendant, ought not to be quashed upon the ground that the affidavit upon which the defendant was arrested did not state that defendant knew A was in the habit of getting intoxicated.

A count in an information charging B with selling intoxicating liquors to be drunk at the place where sold, will be sustained by proof that the liquor was sold by C, as the agent of B, and that it is not necessary to aver, in the information, that it was sold by an agent.

Where the testimony shows that the liquor was sold in the house of the defendant and at his bar, by his son, in the absence of the defendant, without any other evidence of the agency, it is error in a court to charge that such testimony makes a *prima facie* case of authority, from the defendant to the son, to do the illegal act.

ERROR to the probate court of Geauga county.

The case is stated in the opinion of the court.

Forrest & Hathaway, for plaintiff in error.

McCook, attorney-general, for the state.

564] *KENNON, J. An information was filed in the probate court against Parker, charging him with a violation of the liquor law. Parker had been recognized by a justice of the peace to appear before the probate court upon an affidavit, the substance of which is as follows, viz.: That on August 19, 1854, at Geauga county, Parker sold intoxicating liquors to one Solomon Johnson, to be drunk where sold; and also that Parker, on August 25, 1854, sold intoxicating liquors to one Johnson F. Hickcox, a person in the habit of getting intoxicated; and also, that Parker was the keeper of a tavern where intoxicating liquors were sold contrary to the law.

The information contained three counts. The jury found Parker guilty on the first and third counts, and he was sentenced by the probate court to a fine and imprisonment.

The first count charged Parker with selling intoxicating liquors

to Solomon Johnson, to be drank where sold, the same not being wine, beer, ale, or cider, etc.

The third count charged him with selling intoxicating liquors to Johnson F. Hickcox, a person in the habit of getting intoxicated, a fact known to Parker when he sold the liquor, etc.

On the trial of the case before the probate court, it appeared in evidence that the liquor had been sold by a son of Parker, while Parker was sick in another part of the house; but the sale was in the house, and at the bar of Parker's tavern.

The court charged the jury, that proof of the fact that the liquor had been so sold, was *prima facie* evidence that the son, in the sale of the liquor, was acting as the agent of Parker, his father.

The three principal errors assigned for reversing the judgment of the probate court are—

1. That the affidavit did not charge Parker with any offense against the law, or lay any foundation for proceeding in the probate court against him, because it did not allege that Parker knew Hickcox was a person in the habit of getting intoxicated.

*2. That the information should have alleged that the [565] liquor was sold by Parker's son, as the agent of Parker, and not aver that it was sold by Parker; that there was a variance between the allegation in the information and the proof.

3. That the court erred in charging the jury, that if they found that the son of Parker sold the liquor at Parker's bar, in the absence of Parker, it would be *prima facie* evidence that the son acted as agent of his father in the sale.

The opinion of the court upon these three points is—

1. That the affidavit was sufficient for the purpose of arresting, recognizing to appear, and charging Parker, by information in the probate court, with "selling intoxicating liquors to Johnson Hickcox, a person in the habit of getting intoxicated, and that Parker knew such habit." That the affidavit does not require the same strictness as an information or indictment, and that the information charged Parker with an offense not different from that set out in the affidavit.

2. That the proof that the liquor was sold by the son, as agent of Parker, was proper evidence, under an information charging Parker himself with making the sale. The rule that what a person does by another he does himself, applies to this case. There are no accessories. In these minor offenses all are principals.

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3. That the court erred in charging the jury, that the mere fact that the son sold the liquor at his father's bar, was *prima facie* evidence that he sold it at the request, or by the authority, of his father—*prima facie* evidence being sufficient to establish a fact unless rebutted.

For this error the judgment of the probate court is reversed.

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*THOMAS MCGATRICK v. CHARLES WASON.

Where a general demurrer to a declaration is sustained, and thereupon leave to amend the declaration is given, but the plaintiff subsequently, instead of amending, discontinues the action, there is no judgment that bars another suit upon the same cause of action.

W. requested his hired man, G., to assist him in placing certain railroad cars and trucks—which he had sold and agreed to ship from Cleveland to Toledo—on a vessel; to do which it was necessary to raise them from the dock by the use of machinery and manual effort. G. consented. The work was to be done the next day, which was Sunday, November 15, as the vessel was about to sail and her master would not take the cars, etc., unless shipped on that day, and “it was a matter of great necessity that they should be shipped as speedily as possible, as navigation was about closing.” While raising one of the trucks, a part of the machinery gave way, owing to which the truck fell upon G., breaking both his legs. To recover damages for this injury, he brought this suit, charging that it was owing to W.’s neglect that the machinery was insufficient. A verdict being rendered for G., a new trial was moved by W. *Held:*

That if W. had no charge of, or control over, the operation of shipping the cars, etc., but, on the contrary, the duty of shipping them rested solely upon the master of the vessel, and he had the entire control over the operation, and W. was acting merely as his assistant or servant, the action should have been brought against the owner of the vessel, and not against W.

But if it was W.’s duty to ship them, or if it was the joint duty of him and the master of the vessel, he was (as between him and G.) liable for the injury, if it resulted from his neglect, or that of the master of the vessel, to provide suitable machinery; the defect in the machinery being unknown to G. The general rule is that an employer who provides the machinery and oversees and controls its operation, must see that it is suitable; and if an injury to the workmen happen by reason of a defect unknown to the latter, and which the employer, by the use of ordinary care, could have cured, such employer is liable for the injury.

Legally considered, our Sunday act is merely a civil regulation, having no connection with religion, and founded on principles of public policy alone. And the same policy that dictated the prohibitions it contains, also dictated its exception therefrom of "works of necessity and charity."

Works of necessity, within the meaning of the act, are not limited to labor for the preservation of life, health, or property from impending danger. The *necessity may grow out of, or indeed be incident to, the general [567 course of trade or business, or even be an exigency of a particular trade or business, and yet be within the exception of the act. Hence the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so.

The labor in the present case was a work of necessity, within the meaning of the statute, and consequently the point of defense, that the plaintiff was injured while in the commission of an unlawful act, can not be maintained.

A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter; that would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact. It must be clear that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of evidence, or unsupported by it. And if this is the rule, as it undoubtedly is, even in the court where a cause is tried, and before whom the witnesses appeared and testified, *a fortiori* ought to be the rule, when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement.

RESERVED by the district court of Cuyahoga county, on a motion for a new trial.

The facts are stated sufficiently in the opinion of the court.

John Crowell and *S. B. Prentiss*, in support of the motion, made the following points:

I. The judgment of the court on the general demurrer, in the first suit between these parties, was a decision on the merits, and therefore conclusive upon the parties. 1 Phil. Ev. 333 (notes 587, 588, pp. 826, 828); 6 Wheat. 109; 1 Salk. 290; 2 Evan's Pothier, 456; 7 D. & E. 265; 3 Cow. 120; 4 Ib. 559; 1 Wheat. 340; 11 Mass. 445; 1 Croke Eliz. (pt. 2), 668; 1 Mod. 207; 4 Bac. Abr., n. 2; 3 Bouv. Inst. 323, 376, 526, 527; Gould's Plead. 476, secs. 41, 44; 1 Johns. Cas. (2 ed.) 436, 492, and note; 2 Smith's Lead. Cas. 429; *Inman v. Jenkins*, 3 Ohio, 271; *Reynolds v. Stanbery* and others, 20 Ib. 344-350; *Wilcox v. Bayler*, 6 Ib. 406, 408; *White v. Bank of United States*, 6 Ib. 528; *Longworth v. Flagg*, 10 [568 Ib. 300, 304; *Lockwood* and others *v. Wildman* and others, 13 Ib.

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430; *Mants v. The State*, 14 Ib. 295, 305; *Sheperd v. Willis*, 19 Ib. 142, 147; *Price v. The State*, 19 Ib. 423, 424; 4 Johns. Ch. 140.

II. The plaintiff, when the injury happened of which he complains, was in fault himself, being in the commission of an unlawful act, and can not therefore maintain this suit. He was engaged in common labor on Sunday, and not in works of *necessity and charity*. *Drury v. DeLafontaine*, 1 Taunt. 155; *Smith v. Sparrow*, 4 Bing. 84; *Begniss v. Armistead*, 10 Ib. 110; *Bensley v. Bignold*, 5 B. & Ald. 335; *Foster v. Taylor*, 5 Barn. & Adol. 487; *Little v. Pool*, 9 Barn. & Cres. 192; 5 Ib. 406; *Williams v. Paul*, 6 Bing. 653; 5 Am. Jurist, 10; 5 Ala. 467; 10 Ib. 566; 4 Dall. 269; 1 Binn. 110; 6 Watts, 231; 1 Root, 474; 10 Mass. 312; 16 Pick. 250; 15 Ohio, 225; 18 Ib. 489; 20 Ib. 81.

III. The master is not the insurer of the safety of those in his employment from injuries which they may inflict upon each other, unless it is a part of the express contract between them. 4 Met. 49; 3 Cush. 270; 6 Hill, 592; 6 Barb. 231.

Spalding & Parsons, and *Tilden & Paine*, against the motion, contended:

I. That after the demurrer of the defendant was sustained by the court, the plaintiff had leave to amend, and afterward, at the same term, discontinued his suit; which was equivalent to leave originally entered for the plaintiff to become nonsuit, and his rights are all saved.

II. The plaintiff was not engaged in common labor on Sunday, but in works of necessity.

III. The captain of the vessel and the defendant, jointly, undertook the loading of the cars and trucks onto the deck of the 569] *schooner, and both, therefore, were responsible to their employes for the reasonable sufficiency of the ropes and tackles used. *Randleson v. Murray*, 8 Adol. & Ell. 109; 35 Eng. Com. Law, 342.

THURMAN, C. J. This cause was tried by a jury in the district court, a verdict returned for the plaintiff, and a motion for a new trial made by the defendant, which, at his instance, was reserved for the decision of this court. The authenticated statement of the testimony and rulings of the court, is somewhat voluminous, but all that is material to be reported may be very briefly stated.

It seems that Wason requested McGatrick, who was his hired

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man, to assist him in placing certain railroad cars and trucks—which he had sold and agreed to ship from Cleveland to Toledo—on a vessel; to do which it was necessary to raise them from the dock by the use of machinery and manual effort. McGatrick consented. The work was to be done the next day, which was Sunday, November 15th, as the vessel was about to sail, and her master would not take the freight unless shipped on that day; and “it was a matter of great necessity that it should be shipped as speedily as possible, as navigation was about closing.” While raising one of the trucks, a part of the machinery gave way, owing to which the truck fell upon McGatrick, breaking both his legs. To recover damages for this injury, he brought an action on the case against Wason, and filed a declaration, to which Wason demurred generally. The court sustained the demurrer, and thereupon gave leave to the plaintiff to amend his declaration, upon the payment of certain costs; but upon a subsequent day, instead of so amending, he discontinued his action, and shortly afterward commenced the present suit.

There was also evidence tending to prove that it was either Wason's sole duty, or the *joint* duty of him and the master of the vessel, in virtue of an agreement between them, to put the *freight on board; and that the operation of so doing, when [570] the accident occurred, was under his control, or the joint control of the two. A part of the machinery employed was furnished by Wason and a part by the vessel, but the particular piece that gave way was provided by the latter. On the other hand, there was evidence tending to disprove the agreement above referred to, and to show that the whole duty of and control of loading the vessel belonged to the master, and that Wason lent his aid merely as an assistant. Testimony was also given to prove, that but for McGatrick's disobedience of an order given by Wason, he would not have been injured; but he testified that he heard no such order as that spoken of by the witnesses, and was guilty of no disobedience.

The grounds upon which a new trial is asked are thus stated by counsel:

“1. The former recovery, set forth in the answer and proved on the trial, was a complete and perfect bar to this action.

“2. The defendant, when the injury happened of which he

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complains, was in fault of himself, being in the commission of an unlawful act, and can not therefore maintain the suit.

"3 The variance between the allegations in the petition and the proof; or, in other words, the entire failure of the testimony to support the representations in the petition."

We think that the court were right in telling the jury, that the record of the former suit constituted no bar. There was no judgment upon the demurrer, that the defendant go hence, but, on the contrary, leave was given the plaintiff to amend, and the suit was subsequently terminated by a discontinuance. An order simply sustaining a demurrer, without any judgment consequent upon it, is not a recovery.

The next inquiry is, was the labor at which the plaintiff was engaged, when injured, a violation of the Sunday act (Swan's new Stat. 302); and if so, can he recover?

571] *On his part, it is contended that it was a work of necessity, and therefore within the exceptions of the act.

The act forbids "common labor" on Sunday, but excepts "works of necessity and charity."

Was the shipping of the freight, under the circumstances mentioned, a work of necessity? The defendant himself testified that it was. He said: "It was a matter of great necessity that they should be shipped as speedily as possible, as navigation was about closing."

But was it a work of necessity within the meaning of the act?

In answering this question, we must always keep in mind that it is no part of the object of the act to enforce the observance of a religious duty. The act does not, to any extent, rest upon the ground that it is immoral or irreligious to labor on the Sabbath, any more than upon any other day. It simply prescribes a day of rest, from motives of public policy and as a civil regulation; and as the prohibition itself is founded on principles of policy, upon the same principles certain exceptions are made, among which are "works of necessity and charity." In saying this, I do not mean to intimate that religion prohibits works of necessity or charity on the Sabbath; but merely to show that the principles upon which our statute rests, are wholly secular; and that they are none the less so because they may happen to concur with the dictates of religion. Thus the day of rest, prescribed by the statute, is the Christian Sabbath, yet so entirely does the act rest upon grounds

of public policy, that, as was said in *Bloom v. Richards*, 2 Ohio St. 391, 392, it would be equally constitutional and obligatory, did it name any other day, and it derives none of its force from the fact that the day of rest is Sunday. For, as was also said in that case, no power whatever is possessed by the legislature over things spiritual, but only over things temporal; no power whatever to enforce the performance of religious duties, simply because they are religious—but only, within the limits of the constitution, to maintain justice and promote the public welfare.

*Unless, then, we keep constantly in mind that the act [572 rests upon public policy alone, we will be in great danger of giving it a wrong construction; and instead of reading it in the light of the constitution, which prohibits all religious tests and preferences, find ourselves led away from its meaning by the influence of our own peculiar theological tenets.

The difficulty of determining whether, in any particular case of labor, the work was one of necessity or not, within the meaning of the statute, is not usually very great. This is owing to the fact that the requirements of the law are very generally observed; or possibly to the fact that judicial action is seldom involved except when its provisions have been palpably violated.

But it is a task of much difficulty, and one that a court ought not unnecessarily to attempt to draw a line that shall clearly distinguish works of necessity from those that are not.

It is easy to say, that to feed the hungry, to attend the sick, and to rescue a fellow-being from suffering or danger, are works of both necessity and charity; but it would not do to say that none others are. For the personal wants or safety of the human species does not mark the limit. It is a work of necessity and charity to take care of and preserve a dumb brute, as well as a human being; and no one would imagine that the statute is violated by feeding one's cattle, or drawing one's sheep from a pit, on the Sabbath day.

But it is very clear that we have not yet reached the limit, and that it will not do to hold that nothing is a work of necessity that is not performed in the care or for the preservation of animal life. The care or preservation of property, though inanimate, may be a work of necessity. If a house should take fire on the Sabbath, it would obviously be lawful to save it by labor. It would be equally so to save a crop from the effects of bad weather, when to

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omit doing so would result in its loss or material injury—or, for a merchant to save his goods; a manufacturer or mechanic his 573] wares; a seaman his vessel; or, in a *word, any man his property in danger of destruction or injury, on the Sabbath day.

Nor will it do to limit the word “necessity” to those cases of danger to life, health, or property which are beyond human foresight or control. On the contrary, the necessity may grow out of, or indeed be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act. For it is no part of the design of the act to destroy, or impose onerous restrictions upon any lawful trade or business; and hence, under a similar statute, it has been held in a sister state, that it is lawful to keep a blast-furnace at work on Sunday, because it is a work of necessity. So, too, it has been held that, under special circumstances, a mill may grind on that day; and I think it will hardly be questioned, that a gas company may supply gas; a water company, water; and a dairy man, milk, to their respective customers, on that day.

Other illustrations might be given, but these are quite sufficient to show, that the necessity spoken of in the statute, is not an absolute, uncontrollable necessity only; but may be a necessity created by the exigencies of society or trade. If nothing but absolute necessity was intended, it would, in general, be unlawful to prepare a meal on the Sabbath; because it might without difficulty be previously prepared, or because most people might safely enough fast for twenty-four hours. It would be equally unlawful to supply us with gas-light, for we might use candles previously laid in, or retire to our beds at twilight. And so many things, by all men admitted to be lawful, would be brought within the prohibition of the statute.

In using the expression “exigency of trade,” I have been speaking of trade generally, and not of a necessity created by a particular contract a man may have made. It is true, that a man might be ruined by a failure to deliver an article he had contracted to deliver, if he could not ship it upon a Sunday, and this might be with- 574] out any fault of his; in which case it would *become the duty of a court to consider whether he could save himself only by a violation of the law. And when that question shall arise, it may possibly be found difficult to say, that a man may lawfully labor all day to drag a sheep out of a pit, and yet can not perform one-tenth of that labor to save himself and his family from pecuniary destruction; that he may lawfully work to save one dollar’s worth of prop-

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erty in the shape of an animal, but that he violates the law if he save all his property by fulfilling his contract.

In the case before us, however, we are not limited to a necessity arising out of a particular contract; but we have, in addition, a necessity resulting from natural causes and the general course of trade and commerce. The cars were shipped upon the Sabbath, because the vessel—the only one that could be obtained—was to sail that day, and delay was perilous, the navigation being about to close from the severity of the weather. As before remarked, the defendant himself testified, that it was a case of great necessity; and we are unanimously of the opinion that it was one within the meaning of the statute. It follows, that the plaintiff was not in the commission of an unlawful act when the injury occurred, and this ground of the defendant consequently fails.

How the case would stand had the work not been a necessity, it is immaterial to consider, and we express no opinion upon it. It would require investigation and much reflection, for we do not look upon the case cited from 10 Metcalf, 363, as settling the law.

It is next contended, that the testimony failed to support the petition, and made out no cause of action against the defendant.

Under this head certain legal propositions have been argued, as to which I shall merely state our conclusions.

If Wason had no charge of, or control over, the operation of shipping the cars and trucks, but, on the contrary, the duty of shipping them rested solely upon the master of the vessel, and he had *the entire control over the operation, and Wason acted [575 merely as his assistant or servant, then the action should have been brought against the owner of a vessel, and not against Wason.

But if it was Wason's duty to ship them, or if it was the joint duty of him and the master, he was (as between him and McGatrick) liable for the injury, if it resulted from his neglect, or that of the master, to provide suitable machinery—the defect in the machinery being unknown to McGatrick. The general rule is, that an employer who provides the machinery, and oversees and controls its operation, must see that it is suitable; and if an injury to the workman happen by reason of a defect unknown to the latter, and which the employer, by the use of ordinary care, could have cured, such employer is liable for the injury. *C., C. & C. R. R. Co. v. Keary*, 3 Ohio St. 201.

Which of these two supposed cases is shown by the testimony, is

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certainly a matter of great doubt; but as we must presume that the law upon this head was correctly given to the jury—the charge not being set out or excepted to—we must also presume that the jury found the facts to be those above stated, as necessary to make the defendant liable. Should we disturb this finding? If it is clearly wrong, we must do so; if we only doubt its correctness, we must let it alone. In *French v. Millard*, 2 Ohio St. 53, this court said: “We are not satisfied that the verdict of the jury was right. But this is not enough. A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact. It must be clear that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of evidence.” Now, if this is the rule, as it undoubtedly is, even in the court where a cause is tried, and before whom the witnesses appeared and testified, *a fortiori* ought it to be the rule, when another court decides the motion for a new trial, with no other knowledge 576] of the facts than *is derived through the imperfect medium of a written statement?

A majority of the court are unable to say that the verdict in this case is clearly wrong. The motion for a new trial must therefore be overruled, and judgment entered for the plaintiff.

BARTLEY, J., dissented, upon the ground that the verdict was against the weight of the evidence.

 PHILIP FORD v. ABEL F. PARKER.

Section 10 of the act regulating the jurisdiction of justices of the peace, which provides “that justices shall not have cognizance in actions against justices of the peace, or *other officers*, for misconduct in office,” includes postmasters.

When an action is brought against a postmaster for misconduct in office, and the damages claimed are less than \$100, such action may be commenced in the court of common pleas.

In such action, when the petition charges that a letter containing money was

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lost by the negligence of the postmaster, and the evidence introduced on the trial tends to prove that the letter containing the money reached the office of the postmaster, the plaintiff may prove, for the purpose of establishing the negligence, that the office was kept in an exposed situation, and that the servants and clerks of the postmaster, in a store in which the post-office was kept by the postmaster, had free access to the mail-matter in the office.

PETITION in error, to reverse the judgment of the district court in Hancock county.

The case appears in the opinion of the court.

H. H. Hunter, for plaintiff in error :

I. The action was against the defendant for misconduct (negligence) in his office as postmaster. Therefore, although the amount claimed by the plaintiff was less than \$100, yet the *action [577 was properly prosecuted in the court of common pleas originally. Justices' act, 51 Ohio L. 181, sec. 3, clause 3.

II. The court ordered that the plaintiff should become nonsuit, and discharged the jury from further consideration of the case, *after* (as the record shows, see bill of exceptions) it was proved in behalf of the plaintiff, or testimony given in his behalf *tending to prove*.

1. That the plaintiff had inclosed \$75 in bank-notes in a letter directed to John T. Ford, Findlay, Ohio, and mailed the same at Pickerington, in Fairfield county, on June 11, 1853.

2. That the same was received at the post-office in Findlay on the 14th same month.

3. That the defendant was postmaster at Findlay at that time; and,

4. That John T. Ford called for letters at the post-office uniformly once a week, and never received the letter or money in question; and that the same was lost, being the funds of the plaintiff.

On this evidence, *tending to prove* these several propositions, it would have been the duty of the jury, on principles of law, if they believed the facts to be in conformity with the evidence thus given and thus *tending*, to have found a verdict for the plaintiff. For surely if they had returned a special verdict, finding the four points above named to be true, the court would have been called upon to render a judgment in favor of the plaintiff. If the letter in fact

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came to the office of the defendant, and was lost, it could only be by the negligence of the defendant or his servants. At all events a *prima facie* case would have been made against the defendant, on which, without rebutting evidence, the jury might properly have rendered a verdict against him.

For these reasons the court erred in not permitting the case to go to the jury.

III. The plaintiff having given evidence to the jury tending to prove the receipt of the letter at the office of the defendant, and its 578] *loss, as above, it was legally proper for the plaintiff to give additional evidence, such as he offered, and such as was overruled by the court, of the exposed and careless manner in which letters were kept in the office, and of the opportunities of access to the letters in the office by persons other than his properly sworn and qualified assistants, etc., as specified in the bill of exceptions. The loss of the letter being shown, after it reached the defendant's office, the proof thus offered and rejected was very pertinent to make out that the loss was by negligence—that sort of negligence which did not reasonably protect the letters in the office against being stolen or against being carelessly delivered to a wrong person.

It was not necessary in order to render this evidence competent that it should have pointed directly to the very means or specific circumstances of the loss; it was enough for the plaintiff to have shown, as he did, that the letter came to the office of the defendant, and that the way in which the business was done in the office, was not careful and prudent. Such proof being given would entitle the plaintiff to a verdict, unless the defendant, into whose hands the letter was shown to have come, accounted for its loss, consistently with prudence and care on his part. In law, the letter being shown to have come into the office of the defendant, and *not* to have been delivered to the party to whom it was addressed, the burden was thereby cast upon the defendant to account for the letter.

M. C. Whiteley, for defendant in error:

I. If the case was properly in the district court, the plaintiff should have given that court an opportunity to correct any error, by moving to set aside the nonsuit, and for a new trial. Swan's Stat. 660, secs. 297, 299.

II. The amount claimed being less than one hundred dollars, the
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court of common pleas had no jurisdiction. The case is clearly within the cognizance of a justice of the peace, not being *of [579 the class defined in the 3d clause of section 10 of the justices' act, Swan's Stat. 502; 1st, because it is no part of the duties of a postmaster to receive or transmit money—the mails were established for the transmission of intelligence, not money. Act of Congress, regulating the Post-office Department, approved March 2, 1827, sec. 1; Regulations of P. O. Depart., sec. 61. Hence defendant is not liable for the loss of money out of his office, because he holds a commission. His liability is that of a gratuitous bailee, *and not as an officer*. A sheriff is not liable, *in his official capacity*, for money received by him, on judgment, after return of execution; he can not be amerced, nor are his sureties liable. The receipt under such circumstances is not an official duty. The sureties of a deputy-postmaster are certainly not liable for money lost by such deputy in the manner stated in the petition. It was not his duty to receive it, and I regard that as the test of jurisdiction.

III. The evidence offered by plaintiff was properly excluded, no foundation having been laid for its introduction. 1. No evidence was offered that defendant knew of the arrival of such letter at his office, or that the same was ever there. Without knowledge, there can not be negligence. 2. No evidence that the office at Findlay was kept at a place forbidden by the rules of the post-office department. The rules allow the office to be kept in such place as shown by the bill of exceptions. Reg. P. O. Depart., sec. 49.

IV. The evidence in reference to the appointment of clerks, by defendant, was properly excluded. (Plaintiff proved that the clerks were all sworn, *as shown inferentially by the exceptions*.) 1. Because no case is made in the petition to charge defendant for default of his clerks. *Dunlap v. Munroe*, 7 Cranch, 242, 269; 2 Peters' Cond. 484; 1 Bell Com. 400, 401, 468, 469. If the clerks were incompetent, defendant's knowledge should have been proven as a preliminary fact, to make out negligence against him; without such knowledge, he *was only bound to a reasonable superintendence [580 over their official conduct. 2 Kent Com., sec. 40; 2 Law Reports, 229; Story on Bailment, 302.

V. Evidence tending to establish that other persons than sworn deputies had access to the office, was irrelevant, unless the loss could be attributable to such access. That not being claimed, the evidence was properly and for that reason ruled out.

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Had all the questions asked by plaintiff been answered affirmatively, and the answers permitted to go to the jury as evidence, a verdict could not have been sustained, for the reason that the main fact—that is, knowledge—was not and could not be proved.

A judgment should not be reversed merely for the purpose of clearing a party from costs. A new trial is not asked.

KENNON, J. The case was originally brought by Philip Ford, in the court of common pleas of Hancock, against Parker, to recover seventy-five dollars, the value of bank-notes.

The petition stated that Parker was postmaster at Findlay, in Hancock county; that the plaintiff had inclosed in a letter seventy-five dollars, directed the letter to John Ford, Findlay, Ohio, and mailed the same at Pickerington, Ohio; that the letter was received at the post-office at Findlay, on the 14th of August, 1853; that John Ford called at the post-office soon after the day of the receipt of said letter at the office, and demanded said letter containing said money, but the same was not delivered to him; that the money belonged to the plaintiff, and that, by the *negligence* and *carelessness* of the said Parker, the said plaintiff lost the seventy-five dollars. The defendant pleaded that he had no knowledge of the letter, and that it was not lost through his negligence.

On the trial of the case in the district court, the plaintiff offered to prove certain matters, which, being objected to by the defendant, the court sustained the objections and ruled out the testimony; and the plaintiff having rested his case, on motion of the defendant, it was ordered that the plaintiff become nonsuit, and judgment was rendered against him for costs.

581] *A bill of exceptions was taken to the rulings of the court, from which it appears that the testimony of the plaintiff tended to prove, that the letter containing the \$75 was duly mailed at the post-office at Pickerington, in Fairfield county, directed to John Ford, "Findlay, Ohio;" that the letter reached the post-office at Findlay, and was lost; that John Ford, to whom the same was directed, called once a week for mail-matter at the post-office at Findlay, but did not receive the letter; and that the money belonged to the plaintiff at the time of the loss.

The plaintiff asked a witness on the stand in what manner the post-office at Findlay was kept at the time of the loss; which question was objected to by the defendant's counsel, and the objection

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sustained by the court. The plaintiff then offered to prove that the post-office, at the time of the loss, was kept in a variety store, without any separation between the letter-boxes and the goods on the shelves, and that all the clerks and the servants in said store had free and unobstructed access to the letters and mail-matter in the office; which being objected to by the defendant's counsel, the objection was sustained by the court, and the evidence not permitted to go to the jury.

Other questions were also asked, objected to, and the objections sustained.

The real question in the case was, whether the money was lost through the carelessness and negligence of the post-office. The testimony tended to prove every other fact in the case necessary to the plaintiff's right of recovery. Indeed, the answer put in issue no other fact. It was denied by the answer that the letter was lost by the negligence of the defendant, and it was also denied that the defendant had any knowledge of the letter; but all other facts in the petition were admitted to be true by not being denied.

The testimony tended to prove that the letter was lost, and lost after it reached the post-office kept by the defendant. Was it lost by his carelessness or negligence? We do not say that the *mere loss, under such circumstances, was evidence of the [582 negligence of the defendant, sufficient to throw the burden of proof on him that it was not lost by his negligence; but we are of opinion that the plaintiff ought to have been permitted to prove how the office was kept, its exposed position, and the probability arising therefrom that the loss was the consequence of such exposure. Now, if the postmaster had kept his office in the street, or left it open at nights in his absence, and the mail-matter in the office had become lost, it might reasonably be inferred that the loss was caused by such exposure. At any rate, it was proper for the jury to know how the office was kept; whether carefully or negligently; whether it was open and free of access to strangers, or otherwise. And the jury should have been permitted to determine the fact, whether the exposed situation of the letter-boxes was, or was not, the cause of the loss of the letter.

We think the district court erred in ruling out the testimony. But it is claimed by defendant, that neither the common pleas nor district court had jurisdiction of the case, because the original claim was within the jurisdiction of a justice of the peace, being

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only \$75. The statute provides that justices of the peace shall not have jurisdiction of actions against justices of the peace, or other officers, for misconduct in office. This was an action against a postmaster for misconduct in office, and we think the language of the statute includes postmasters, and that therefore the action was properly brought in the court of common pleas.

Upon the whole the judgment of the district court is reversed, and the cause remanded to that court for further proceedings.

ATLANTIC AND GREAT WESTERN RAILROAD COMPANY v. FRANCIS CAMPBELL.

In a proceeding to appropriate the land of a person for the use of a railroad company, the owner of the land proposed to be appropriated is a competent witness to testify in his own behalf, provided the proceedings have been instituted since the code took effect.

As a general rule, the *opinion* of a witness as to the *amount of damages* which the landholder will sustain by reason of the construction and use of a railroad is not evidence.

ERROR to the common pleas of Marion county.

The facts are stated in the opinion of the court.

J. & S. H. Barton, for plaintiff in error.

Williams & Hume, and *Stanton & Allison*, for defendant.

KENNON, J. Proceedings were instituted before the probate court of Marion county, by the plaintiff, to appropriate to its use, for railroad purposes, a portion of the defendant's land. The appropriation and assessment of damages were made in that court, and the proceedings afterward reversed by the common pleas, and an assessment of damages made in the common pleas.

Upon the trial before the jury, Campbell was called as a witness, to testify in his own behalf; was objected to by the company as incompetent, but the court overruled the objection and permitted him to testify. He testified that he was the owner of 1,240 acres of land in the county of Marion, situate in different tracts, of from

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120 to 320 acres each—some adjoining, and some $1\frac{1}{2}$ miles from the railroad; that he had all of said lands in connection, for grazing, feeding, and agricultural purposes, in prosecution of his principal business of dealing in stock; that the land through which the road passed was principally used for raising feed, and feeding-grounds for stock grazed on other lands.

*The following question was then put to Campbell by his attorneys, viz.: "What amount of damage do you think you would sustain by reason of the location and construction of said railroad over your lands, in that part where located, and the market value of the same; taking into view the amount of land taken, the additional fencing which would be required, the shape of your fields, the inconvenience of crossing said railroad, the danger of fire from the locomotive, the danger of scaring cattle, and all other injuries, necessarily incident to the construction and running of said railroad on said lands?" To this question the counsel for the road objected, but the court overruled the objection, and the witness was permitted to testify as to his opinion of the *amount* of all damages which would accrue to the said lands by the location and operation of said railroad, from all direct and positive injury to the same; and also all damage, or liability to loss or injury, which was necessarily incident to such location and operation, which would diminish the value of said land in the market.

Other witnesses were also asked their opinion as to how much damage Campbell would sustain, in the market value of the land, by reason of the appropriation of the land by the company; which question was also objected to by the railroad company, but the objection was overruled, and the witnesses permitted to answer the question.

The jury assessed the damages to Campbell at \$1,800, for which the court of common pleas rendered judgment.

The principal errors assigned in the case are—

1. That Campbell ought not to have been permitted to testify in his own case.
2. That the *opinion* of witness as to the *amount* of damages sustained ought not to have been received.
3. That no judgment ought to have been rendered on the verdict by the court, but it should simply have confirmed the verdict, and, upon payment of the amount, have rendered judgment to the effect that said corporation should hold the property appropriated.

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585] *As to the first error assigned, this court hold, that by sections 310 and 311, of the code, and section 6 of the act regulating the proceedings in appropriations of lands (Swan's Stat. 233), it is clear that the court did not err in permitting Campbell to testify in his own case.

By section 310 of the code, it is provided that no person shall be disqualified as a witness, in any civil action or *proceeding*, by reason of his interest in the same as a party or otherwise.

The only exception is found in sections 311 and 313 the former of which provides, that nothing in section 310 shall, in any manner, affect the laws now existing relating to the settlement of estates of deceased persons, infants, idiots, lunatics, or the attestation of the execution of wills and testaments, or the conveyance of real estate, or any other instrument required by law to be attested. We see no reason why a party is not a competent witness in all civil proceedings, except in the cases expressly excepted by sections 310 and 602 of the code; nor why any person is incompetent except those persons expressly named in section 313 of the code. Sections 604 and 605 have reference to the *forms of proceedings*, and not to the competency of witnesses.

As to the second error assigned, we are of opinion that the amount of damages which a land-owner would sustain by reason of the appropriation of his land by a railroad, is a question of fact to be determined by the jury, not from the opinion of witnesses, but from the facts of the case; that it is not a question of science or skill, which lies more peculiarly in the knowledge of one man than another. But in coming to the conclusion that the opinion of witnesses as to the amount of damages sustained is incompetent evidence, we do not intend to say that a witness may not testify to the value of the land, before and after the location of the railroad, but, simply, that a witness can not give his opinion as to the *amount of damages* which the landholder will sustain by reason of the road passing over the land. In admitting such opinions, we

586] *think the common pleas erred, and for this reason the judgment is reversed and verdict set aside, and the case remanded for further proceedings. This makes it unnecessary to determine whether the court should, or should not, have rendered judgment on the verdict.

**FOSTER M. FOLLETT, ADMINISTRATOR OF JOSHUA WOOD, DECEASED,
FOR THE USE OF BEAR & MOORE, v. NICHOLAS BUYER.**

In an action upon a note brought by the payee, for the use of his assignee, against the maker—the note having been assigned (but not indorsed) after due—and it not appearing that the payee was insolvent when he made the assignment, the maker can not set off money paid by him as surety for the payee, after he received notice of the assignment, although the money paid was upon a liability entered into before the assignment, but which had not been reduced into judgment against the surety before notice of the assignment was given. The maker had no demand upon the payee when he received such notice, but was only *contingently* liable for him.

In error to the district court of Erie county.

February 14, 1851, Follett, as administrator of Wood, for the use of Bear & Moore, brought an action of assumpsit, in the Erie common pleas, against Buyer, on a note, or due-bill, for \$100, dated February 21, 1849, made by Buyer, and payable to Wood or order.

Buyer pleaded to the declaration non assumpsit, with the common notice of set-off.

The jury found a special verdict, which, omitting the formal parts, is as follows :

“The jury, upon their oaths, do say :

“1. That the amount of the note, due in one day from date, of *N. Buyer, to Wood, is one hundred dollars, and interest on [587 same to September 22, 1851, \$15.50 ; making \$115.50.

“2. The amount of Buyer's account against Wood, accruing previous to Wood's death—it being the balance due, including interest thereon—is \$22.96; which accrued before Buyer had notice that Bear had the note.

“3. The amount of money paid by N. Buyer for the use of Wood, on judgment of Flood & Landsdown v. I. Wood—which was entered April 13, 1849, and bail entered by N. Buyer April 23, 1849, —which judgment N. Buyer has paid, to the amount of \$51.24.

“Also a joint note, made to Ira Brainard by Joshua Wood, with N. Buyer as surety, dated January 25, 1849, due six months from date. Judgment rendered September 20, 1849, against N. Buyer alone, amounting, September 22, 1851, to \$64.04; which has been paid by Buyer, in amounts, as follows: Paid September 24, 1850,

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\$34.00—interest on same, \$2.04; paid October 4, 1850, \$20.00—interest on same, \$0.85; paid October 19, 1850; \$7.80—interest on same, \$0.30; making \$64.00.

"4. That Bear obtained the note on or about June 17, A. D. 1849; about that time gave to Buyer notice thereof.

"5. That the defendant became liable on the judgment of Flood & Landsdown April 23, 1849, and to Ira Brainard, on note and judgment, January 25, 1849.

"6. That Joshua Wood died July 20, 1849.

"But whether, upon the whole matter aforesaid, by the the jurors aforesaid in form aforesaid found the said defendant is entitled to set off the said moneys, so paid by him for said Wood, deceased, against the said plaintiff's claim, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the court; and if," etc.

The court held that he was not entitled to set off the moneys 588] *paid by him upon the judgments aforesaid, but allowed the set-off of \$22.96, due upon account; and gave judgment accordingly.

To reverse this judgment, Buyer filed a petition in the district court, assigning for error said non-allowance of set-offs. The court reversed the judgment. To reverse the judgment of reversal the present petition was filed.

W. H. Tucker, for plaintiff in error, made the following points:

That at the time the note was transferred by Wood, there was no indebtedness existing on his part to Buyer, upon which the latter could have maintained an action. There was merely a contingent liability, possessing, at that same time, none of the statutory requisites of a set-off. *Barbour on Law of Set-off*, 54; *Miller v. The Receiver of the Franklin Bank*, — 444; *Gale v. Lutwell*, 1 *Young & Jarvis*, 180; *Whitaker v. Rush*, Amb. 407; 2 *Yates*, 208; *Barbour*, 78; *Shepherd v. Little*, 14 *Johns*. 210; *Bowen v. Bell*, 20 *Ib.* 338; 1 *Selw. N. P.* (4 *Am. ed.*) 137; 1 *Esp. N. P.* 278; *Duncan v. Lyon*, 3 *Johns. Ch.* 551; 8 *Cow.* 310; *Barbour*, 79; 1 *Poth. on Oblig.* 582; *McConnell v. Morrison*, 1 *Litt.* 206; *Evans v. Prosser*, 3 *Term*, 196.

That an over-due promissory note, in the hands of an assignee for a valuable consideration, is governed by the same principles as those which govern a chose in action; and that the purchaser of a chose in action takes the whole interest in it, subject only to the

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legal offsets or demands that exist against it at the time of the purchase. *Bartlett v Pearson*, 29 Maine (16 Shep.), 9; *Mead v. Gillett*, 19 Wend. 397; *Best v. Lawson*, 1 Miles, 10; *Barbour on Set-off*, 58, 60, 63, 66; *Driggs v. Rockwell*, 11 Wend. 504; *Gourden v. Ins. Co. N. America*, 3 Yates, 329; *Rousset v. The Same*, 1 Binn. 429.

That if the maker of a note makes no objection, on receiving notice of its purchase, he will be estopped from pleading, as a set-off, any demand which accrued subsequent to the notice. *McClelland v. Walker*, 26 Maine (13 Shep.), 114; *Gourden, v. *Ins. Co. N. America*, 3 Yates, 329; *Granger v. Granger*, 6 Ohio, 35.

Goodwin & Wildman, for defendant in error, submitted the following propositions:

That the note having been assigned after the day on which it was made payable, the maker is entitled to make "such a defense" as he could have set up against the original payee.

That the note was not indorsed, and must, for the purposes of this suit, be treated as non-negotiable paper; and the assignee of a chose in action ought not to be placed in a better position than the assignor. 12 Mass. 198.

That the right to the set-off is legal, because the demands of Buyer were liquidated and paid before the action was brought. *Swan's Stat.* (old ed.) 850.

The defendant had a right to pay a debt contracted before the assignment, and to claim it as a set-off. 6 Cranch, 205; *Hatch v. Green's Adm'r*, 12 Mass. 195, 197; 18 Ohio, 589.

A purchaser of a chose in action must always abide by the case of the party from whom he buys. 1 Ves. 248; *Beebe v. Bank of N. Y.*, 1 Johns. 553; *Tullman v. Anderson*, Wright, 698; 2 Vern. 765; 3 Merw. 107; *Barbour's Set-off*, 92; 2 Maule & Sel. 510.

There is no evidence that plaintiffs in error paid a consideration for the note, and they ought not to recover. *Bailey on Bills*, 544.

THURMAN, C. J. The special verdict is imperfectly drawn, but the facts of the case may nevertheless be ascertained from it. It appears that, on February 21, 1849, Buyer made his note, or due-bill, to Wood, or order, for \$100, payable one day after its date; that, on June 17, 1849, Wood transferred it, without indorsement, to Bear, or Bear & Moore; of which transfer, Bear gave notice to

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Buyer the some day; that prior to the receipt of this notice, Wood 590] had become indebted to Buyer twenty-odd *dollars, upon open account, and Buyer had become bound as his bail, for stay of execution upon a judgment of Flood & Landsdown, which stay had not yet expired—and had also become his surety, in a note not yet matured, to Ira Brainard; that, subsequent to the receipt of said notice, and after Wood's death, Brainard took a judgment against Buyer on said note; which judgment, and also the judgment of Flood & Landsdown, Buyer afterward, and after Wood's death, discharged.

Upon these facts, and in the absence of any finding that Wood was insolvent when he made the transfer to Bear, or Bear & Moore, the question for consideration is, whether Buyer was entitled to set off, in the action below, the money paid by him in discharge of said judgments.

It is contended that he was so entitled, and that the right was secured to him by the statute in respect to negotiable instruments (Swan's new Stat. 575, sec. 3), and also by the well-settled principles of the law of set-off, as now administered both at law and in equity.

The statutory provision, upon which reliance is placed, is in these words:

"That if any such bond, note, or bill of exchange shall be indorsed after the day on which it is made payable, and the indorsee shall institute an action thereon against the maker, drawer, or obligor, the defendant shall be allowed to set up the same defense that he might have done, had the same action been instituted in the same name, and for the use, of the person to whom the said bond, note, or bill, was originally made payable."

This enactment is, I suppose, a mere affirmation of a right that existed without it; and although this case is not within its very letter—the note not having been indorsed and the action being in the name of the payee—yet it is within its spirit, and the plaintiff is in no better position than he would be in, had the note been indorsed and the action been brought in the name of the indorsee.

591] *But it is a mistake to suppose that it was the design of the statute to create an unlimited right of set-off as against an assignee; or, in other words, to allow every set-off against him that would be available against the payee had the note never been

transferred. When an overdue or non-negotiable note is assigned, the assignee takes it subject to all the equities existing between the payee and the maker; and hence it is competent for the latter, notwithstanding the assignment, to show that it was obtained by fraud, or without consideration, or that, before he received notice of the assignment, it had been paid or otherwise discharged. So, too, he may set off any liquidated demand which he held against the payee when he first obtained information of the assignment, but not claims subsequently acquired, even though they had their origin in previous transactions.

I am aware that, by some highly respectable courts, an exception to this rule has been introduced, where the payee was insolvent when he made the assignment, and the maker was afterward compelled to pay money for him on a contract of suretyship, entered into before the assignment took place—it being considered hard and inequitable that an insolvent payee should have the power, by an assignment made under such circumstances, to cast a loss upon his own surety. *Tuscumbia, Courtland and Decatur R. R. Co. v. Rhodes*, 8 Ala. N. S. 206; *Wathen's Ex'r v. Chamberlin*, 8 Dana, 164; *Williams v. Helme et al.*, 1 Dev. Eq. 151.

But these decisions rest expressly upon the ground of the assignor's insolvency; and consequently where, as in the case before us, that element is wanting, there is no room for the exception to the general rule. How we should hold were that fact in this case, it is unnecessary to consider; but how we must hold, upon the facts that are before us, seems to us well settled.

The general principle, that, as against a *bona fide* assignee, there can be no set-off of demands upon the assignor acquired after notice of the assignment, and that a court of law is fully *competent to protect the assignee, is certainly well established. *Pancoast v. Ruffin*, 1 Ohio, 381; *Weakly v. Hall*, 13 Ohio, 174.

That a mere contingent liability—not even reduced into judgment—as surety for the assignor, is not a demand upon him, would seem to be sufficiently obvious; and where nothing more exists at the date of the assignment, and the assignor is solvent, a subsequent payment of the surety, in discharge of such liability, will not give him a right of set-off as against the assignee. In *Granger's Adm'r v. Granger*, 6 Ohio, 35, such a claim to set-off was rejected, even as against the administrator of an insolvent obligee;

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and although one of the reasons given for the decision was, that to allow it "would change the course of distribution of intestate estates," it is clear that the principal ground relied on was, that "no cause of action or demand existed against the intestate at his death;" or, in other words, when, by operation of law, the chose in action sued on was transferred to his administrator. The court said: "The next question propounded to us is, in a suit by an administrator, upon his intestate's claim, can the defendant set off a demand for money paid after the death of the intestate, upon a liability entered into by the defendant as surety for the intestate? Our judgment resolves the question in the negative. No cause of action or demand existed against the intestate at his death. A liability only was incurred, upon which, on the contingency of the security being compelled to pay for the intestate, he would have a right of action for his indemnity. A bare possibility that, in a certain future contingent event, he would have a demand, is not a debt due from the intestate, and such a claim has not the mutuality required for a set-off."

It is quite apparent that this decision not only sustains the ruling of the common pleas in the case before us, but that it goes further, and would have sustained a like ruling even had the note sued on never been transferred by Wood. Indeed, had that been the fact, the two cases would be precisely alike.

593] *See, also, *Ridgway v. Collins*, 3 Marsh. 412; and *Wathen's Ex'r v. Chamberlin*, *supra*.

I ought perhaps to remark, that the decisions under the bankrupt laws have very little, if any, application to this case. Those statutes have generally permitted a set-off of mutual *credits*, whether due or not, and have therefore administered a much broader equity than the ordinary law of set-off. But perhaps it would be found difficult, even under the bankrupt laws—were the case in bankruptcy—to sustain the defendant's claim.

We are of the opinion that the ruling of the common pleas was correct, and that, consequently, the reversal of its judgment was erroneous. The judgment of reversal must therefore be reversed, and the original judgment be affirmed.

JOHN S. ROBINSON v. GEORGE KIOUS AND WILSON ROWE.

Section 92 of the justices' code (Swan's Stat. 514) does not make the payment of the jury fee a condition precedent to the rendition of judgment. If it be not paid, the justice may make an order that the successful party pay it, and enforce such order by an attachment; but he can not omit to give judgment because it is not paid.

Section 107 of the justices' code provides that, "upon a verdict, the justice must immediately render judgment accordingly." This provision may not make a judgment rendered upon a subsequent day absolutely void, but it makes it irregular; and for such irregularity, when not waived, it is reversible.

The common pleas, upon the reversal of such a judgment, must retain the cause for trial and final judgment.

IN ERROR to the court of common pleas of Madison county.

The facts sufficiently appear in the opinion of the court.

**R. A. Harrison*, for plaintiff in error, made the following [594 points:

That the judgment of the justice, reversed by the common pleas, was the only one he could have rendered in the case, inasmuch as he had no power to render judgment against the plaintiff as if in default, though payment of the jury fees was delayed.

That after paying the jury fee, the successful party could, of right, insist that the verdict should be entered and judgment rendered accordingly.

That though section 107 of the justices' code, directs the justice to render judgment immediately after the verdict, it does not provide that he shall not do it afterward; and section 92 expressly provides, that he shall not do it until after the jury fee is paid. The provision as to time, of section 107, is therefore merely directory to the justice, and not a limitation upon his power.

That "where statute directs a public officer to do an official act, regarding the rights and duties of others, in a certain time, without any negative words restraining him from doing it afterward, the naming of the time will be considered as directory to him, and not as a limitation upon his authority." *Pond v. Negur*, 6 Mass. 230; *People v. Allen*, 6 Wend. 486; *Hooker v. Young*, 5 Cowen,

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269; *Stevens v. Breatheven*, Wright, 733; *Pugh v. Corwine*, 10 West. Law Jour. 79, Smith on Stat. and Cons. Law, sec. 670.

That the provision of section 107, was intended as a protection to the party obtaining the verdict; that the statute is remedial and ought to be liberally construed; and that, if the construction put upon the statute by the common pleas should stand, a mandamus could not issue to a justice who neglected his duty, as an allegation that the time had elapsed in which he was authorized by statute to render judgment would be a good answer for him.

Wilcox & Fisher, for defendant in error, advanced these propositions:

That where there is a verdict of a jury, the judgment shall be 595] *entered immediately; because all matters of fact are settled by the jury, and the justice has no need for time to consider.

If it is the fault of the justice that the judgment is not rendered within the proper time, he is liable to an action.

If it is the fault of the party, as in this case, by not paying the jury fees, he must pay the costs and begin again, *de novo*.

In New York, a justice adjourned a case until 2 o'clock on a certain day; at 9 o'clock on the day the parties were called, but the defendant made default, and the justice held the case over till the next day, when he gave judgment. This was adjudged to be a discontinuance. 2 Johns. 192.

THURMAN, C. J. Robinson sued Kious and Rowe before a justice of the peace.

July 1, 1854, a trial by jury was had, and a verdict rendered in favor of the plaintiff. The jury fee not being paid, the justice withheld judgment until July 5, 1854, when the plaintiff paid it, and the justice gave judgment upon the verdict.

The common pleas reversed the judgment, because it was rendered *too late*, and retained the cause for trial.

To reverse this judgment of reversal, the present petition was filed.

The decision of the case depends upon the effect of the following sections of the justices' code (Swan's new Stat. 514, 516):

"Sec. 92. Upon the verdict being delivered to the justice, and before judgment being rendered thereon, each juror shall be entitled to receive fifty cents at the hands of the successful party,

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which shall be taxed in the costs against his adversary. When the jury shall be unable to agree upon a verdict, the same compensation shall be paid them by the party calling the jury, and the same shall be taxed in the cost-bill against the losing party."

"Sec. 107. Upon a verdict, the justice must immediately render judgment accordingly. When a trial is by the justice, judgment must be entered immediately after the close of the trial, *if [596 the defendant has been arrested or his property attached; in other cases, it must be entered either at the close of the trial, or if the justice then desire further time to consider, on or by the fourth day thereafter, both days inclusive."

The latter of these sections plainly required the justice, in this case, to render judgment, according to the verdict, *immediately* upon its return; the former as plainly required the plaintiff to pay the jury fee before the entry of judgment. He failed to do so, and thereby, say the counsel for the defendant in error, discontinued his suit.

But let us look at both sides. Suppose a verdict be for a defendant, and he fail to pay the jury, what then is to be done? It is obvious that the suit can not be discontinued by any act or omission of the defendant, and it is equally clear that judgment can not be given against him while the verdict stands in his favor. Shall, then, the justice set aside or treat the verdict as a nullity, and order a new trial? If so, all that a defendant has to do who is dissatisfied with his verdict, or wishes to prevent or delay an appeal by the plaintiff, is to refuse to pay the jury fee, and a new trial follows of course. This will not do; nor will it do to withhold judgment until the defendant pay the fee and then render it, for he may never pay it, in order to prevent the plaintiff from appealing, since there can be no appeal until after judgment.

On the other hand, suppose the verdict to be for the plaintiff; if his failure to pay the jury operates as a discontinuance, then all the trouble the defendant may have been subject to in order to reduce the plaintiff's claim, or to establish a counter-claim or set-off, however successful before the jury, goes for nothing; and he may be harassed with as many successive suits, for the same cause of action, as the plaintiff may see fit to bring, each one being discontinued in the same way. For the New York doctrine, that the verdict of a justice's jury, without a judgment upon it, operates as a bar, could have no application; and this for the reason, that

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597] that doctrine rests upon the fact that a justice *in that state has no power to award a new trial; and hence a judgment follows a verdict there as a matter of course, and may, for the purpose of an estoppel, be considered as rendered, though not formally entered. *Felter v. Mulliner*, 2 Johns. 181. But in this state a justice may, upon a certain showing, grant a new trial (Justices' Code, sec. 87); and surely no judgment could be considered as constructively rendered in a suit discontinued for want of a necessary prerequisite to a judgment.

To us it seems that the legislative intention is plain enough, and it is one that obviates all the difficulties to which I have referred. There is nothing in section 92 that makes the payment of the jury fee a condition precedent to the rendition of judgment, nor was it intended that it should be. Its object is simply to fix the amount to which the jurors shall be entitled, and prescribe the time when and party by whom it shall be paid. It is to be paid, in the first instance, when a verdict is rendered, by the successful party; and if he fail to do so, the justice may enter an order that he pay it, and enforce compliance with it by an attachment. *Stevens v. Breatheven, Wright*, 733, 735.

But judgment must be entered, and that immediately, in compliance with section 107, whether the jury fee be paid or not. The justice has no discretion to postpone judgment upon a verdict to a future day, and if he do so, his judgment, although it may not be void, will be erroneous, and reversible for irregularity and non-compliance with the statute.

The court of common pleas was, therefore, right in reversing the judgment in question, and it properly retained the cause, as required by section 532 of the civil code.

Judgment affirmed.

598] *SETH A. ABBEY v. OLIVER C. SEARLS AND LORENZO J. RIDER.

Proceedings for a trial of right of property, resulting in an order of restitution and a return of the property, pursuant to the order, are no bar to an action by the claimant against the officer to recover damages for the seizure and detention of the property.

Abbey v. Searls and Rider.

MOTION by Abbey, for leave to file a petition in error, to review a judgment recovered against him by Searls & Rider, in the district court of Cuyahoga county.

S. B. Prentiss and *G. E. Herrick*, in support of the motion :

"Where a stranger to an execution, who claims property taken on the execution, elects to try the right of property before a justice of the peace under the statute—after such disposition of cause, the officer taking the property is not liable in another action at the suit of the claimant." *Swan's Rev. Stat.* 676; *Patty v. Mansfield*, 8 Ohio, 369.

THURMAN, C. J. Abbey, sheriff of Cuyahoga county, under color of an order of attachment against the property of one Harris B. George, seized certain goods in the possession of Searls & Rider, and detained them until an order of restitution was made by a justice of the peace, upon a trial of the right of property instituted by S. & R., pursuant to the statute. After the restitution, S. & R. brought a civil action against Abbey, to recover damages for the seizure and detention. The district court held that the proceedings before the justice did not bar the action; the plaintiff recovered a judgment. To reverse this judgment the present petition is exhibited, and leave is asked to file it. The sole ground of the petition is the ruling above mentioned.

In *Patty v. Mansfield*, 8 Ohio, 369, it was held that if the verdict and judgment upon a trial of right of property, are [599] against the claimant, he can not afterward bring and maintain an action against the officer for the seizure or detention of the property, but that his rights, as against any other person, are not affected thereby. The ground of the decision was, that the principal object of the statute is to furnish protection to an officer making a mistake in the discharge of his duty; "an object that would not be effected, if, after a trial of the right of property and a decision against the claimant, the officer could still be subjected to an action at his suit." For the claimant is not bound to have a trial of the right of property; and if he, nevertheless, see fit to have it, and fail to establish his right—thereby adding apparent strength to the claim of the creditor, that the property be held by the process—he ought not to be allowed, in a subsequent proceeding against the officer, to show his right to it.

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But this reasoning has no application where the result of the trial is *in favor* of the claimant. In such a case, no one has ever doubted that he might replevy the property out of the hands of the officer, or bring trespass against him, if he refuse to redeliver it; and if so, why may he not have his action for the damages sustained prior to a redelivery? He would recover them in the action above supposed, where there was no redelivery, and why should a return of the property defeat such a recovery? What bar is there to his right of action? He has sustained a wrong, and he ought to have a remedy, otherwise manifest injustice is done. We see no reason to depart from the maxim of the law, that where there is a right there is a remedy to enforce it. Nor is there anything in *Patty v. Mansfield*, that requires us to do so in this case.

Motion overruled.

600] *JOSEPH HALE, EXECUTOR, v. WILLIAM WETMORE ET AL.

FROM Summit county.

This was a bill of review, the object of which was to reverse a decree pronounced by the late Supreme Court, in Summit county, in a suit brought by William Wetmore against Joseph Hale, executor, and others. The papers having been returned to the county shortly after the rendition of the decree of reversal, hereinafter mentioned, the opinion of the court could not be drawn up at length. For the same reason, the Reporter is unable to make a statement of the facts. These circumstances, however, are not very material, as the points decided are fully given below; and a statement of the facts is not necessary in order to comprehend them.

Otis & Wolcott, for complainant in review.

R. P. Spalding, and *Harris & Son*, for defendants.

THURMAN, C. J. A surety against whom judgment has been rendered, may, without making payment himself, proceed, in equity, against his principal, to subject the estate of the latter to the payment of the debt. *Stump v. Rogers*, 1 Ohio, 533; *Horsey v. Heath*

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et al., 5 Ib. 355; McConnel v. Scott, 15 Ib. 401; Wright v Simpson, 6 Ves. 734; Tankersly v. Anderson, 4 Dess. 47; Swan's Stat. (old ed.) 878, sec. 5.

In a suit thus brought, by a surety against the manager and members of a firm, for whom he had become bound as surety for a partnership debt, which suit was defended upon the ground that the manager had contracted the debt upon his own account alone, and not for the firm, and that the firm was not bound therefor; the manager, prior to the acts to improve the law of evidence (2 *Curw. 1522, 1597), was not a competent witness for the com- [601] plainant to establish the liability of the firm. It was his interest to charge the firm with the debt, and thereby procure a decree that the firm should pay it and save him harmless. And such a decree could be rendered in such suit, and would be conclusive as between the manager and the firm. Marshall v. Thrailkill's Adm'r, 12 Ohio, 275; Dougherty v. Walters, 1 Ohio St. 201.

For the same reasons, one of the partners, after the dissolution of the firm, was not a competent witness for the complainant in such suit, to establish the liability of a copartner who had assumed the partnership debts, as he thereby, as between himself and copartner, shifted the entire responsibility upon the latter, or, at least, brought him in to share it.

It was an error, therefore, to admit the testimony of such witnesses, taken before the passage of said acts; and the other testimony not being sufficient to sustain the decree, it must be reversed, notwithstanding such witnesses are now competent in this case, under the provisions of said acts.

The provisions of the code do not apply to suits pending when it took effect, nor to proceedings to reverse decrees in chancery. They are to be prosecuted and defended as if the code had not been adopted (secs. 533, 602). It follows, that the acts aforesaid, though repealed as to other suits, are yet in force as to suits pending when the code took effect, and to bills of review. And where a decree was rendered before the code took effect, but reversed afterward, and the original cause reinstated for further proceedings, it is to be deemed a suit pending when the code took effect, within the meaning of the above provisions.

Decree reversed and cause remanded for further proceedings.

602] *HARKRADER, CRANE ET AL. V. LEIBY ET AL.

L., an insolvent debtor, and in contemplation of such insolvency, made a conveyance by mortgage to three persons, conditioned to be void if he should save them harmless upon certain indorsements made by them for his benefit "to divers persons;" and should also pay to certain others of his creditors named the several sums of money owing by him to them. *Held:*

1. That such conveyance is, in substance and legal effect, an assignment within the purview of the act of 1838, relating to assignments by insolvent debtors to trustees with the design to prefer one or more creditors to the exclusion of others; and by force of that act, is made to inure to the benefit of all the creditors, in proportion to their respective demands.
2. The act does not affect the mortgage given by an insolvent debtor to secure the debt of one of his creditors, or to indemnify him against a liability by indorsement or otherwise, assumed for the benefit of the debtor; although it may have the effect to prefer such creditor and deprive others of the ability to obtain satisfaction of their claims.
3. To bring a case within the operation of the law, there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it for the benefit of some one or more of the creditors of the debtor, other than himself.
4. An assignment by way of mortgage may effect such transfer; and in such case, the mortgagee becomes a trustee for such creditor or creditors, and liable to account to him, or them, for the interest so received.
5. Where such interest is received by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it inure to the benefit of all his creditors, and distributes the fund to all, in proportion to their respective demands.
6. If the assignee, in such case, is made by the terms of the instrument, or by necessary implication, a trustee for any one or more of the creditors, he becomes of necessity, by force of the statute, a trustee for all, and in respect to all the property transferred by it.
7. As therefore, the mortgagees in this case were made trustees for the other creditors named, the law has made them trustees for all the creditors of the mortgagor.
8. Whether the description of the debts and liabilities referred to in this condition of the mortgage is not too vague and uncertain to sustain it as a valid lien, if no other objection existed—*Quære?*

603] *BILL of review; reserved in the district court of Butler county.

Harkrader et al. v. Leiby et al.

The original bill was filed by the complainants, in the court of common pleas of Butler county, in 1853. It prayed that a certain mortgage, executed by Daniel Leiby to Joseph, Jacob, and George Leiby, on certain real estate at Middletown, Butler county, might be postponed or set aside, and the property so mortgaged sold for the payment of judgment liens and the general benefit of creditors. The petition represented that the complainants recovered said judgments in the years 1848-9, against Daniel Leiby and H. P. Clough; that H. P. Clough had no property out of which the judgments could be made, and that levies had been made upon the property in Butler county, and also upon certain real estate owned by Daniel Leiby, in the city of Cincinnati; that the Cincinnati property was mortgaged by Leiby to Gardner Phipps, one of the defendants, on the 20th of October, 1847, to secure the payment of three promissory notes, each for the sum of \$2,387.49; that Phipps had instituted a suit in Hamilton county and obtained a decree, by virtue of which the said property had been sold at a great sacrifice to said Phipps; and that the proceeds of said sale were applied, first, to discharge the amount found due to Phipps by the decree, and the residue directed to be paid to George Leiby, Joseph Leiby, and Jacob Leiby, upon a certain pretended mortgage given by Daniel Leiby to them, dated June 3, 1848; that complainants were not made parties defendants to the proceedings in Hamilton county, although most of them had a subsisting levy upon the said premises; that they knew nothing of the said proceeding until after the sale, and that they claim not to be prejudiced thereby; that the mortgage given to George, Joseph, and Jacob Leiby, was without consideration, and for the purpose of defrauding complainants and other creditors of Daniel Leiby; and that the mortgage did *not sufficiently describe the said premises, and was not [604 legal notice to the creditors who levied upon the said premises.

The complainants further stated, that on the 3d day of June, 1848, Daniel Leiby executed a certain other mortgage to George, Jacob, and Joseph Leiby, by which, in consideration of several thousand dollars pretended to be paid, he conveyed to them some pretended interest in certain real estate, by the following description: "All that certain real estate, to wit—all the real estate owned and held by the said Daniel Leiby, in the town of Middletown, in the county of Butler, and State of Ohio, and being the same conveyed by Abner Enoch to said Daniel Leiby, and by George Leiby

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to said Daniel Leiby; also all the real estate owned and held by said Daniel Leiby, in common with other persons, being the interest of said Daniel therein, in said town of Middletown, and all the equitable title of said Daniel Leiby, in his mill property at Middletown aforesaid, held by said Leiby under contract." The bill then states that, by virtue of the said mortgage, George, Jacob, and Joseph Leiby pretend to have a prior lien upon the property levied upon by complainants, in the county of Butler; and complainants claim that said mortgage is void for uncertainty and indefiniteness of description, and deny that it constituted any notice to them of its being a lien on said property levied on, or that they had notice otherwise of that fact. They also claimed that the mortgage was void for the uncertainty of its condition, inasmuch as it recited that George, Jacob, and Joseph Leiby were indorsers and security for Daniel Leiby, in divers sums of money and debts, due and to become due, but did not state the amount for which the mortgagees were security; nor to whom the same, or any part, was due; nor the nature of the security; nor any other fact by which a creditor of Daniel Leiby's could ascertain the validity of the mortgage lien. They further insisted that, if held valid, the mortgage must be, in equity, construed to be an assignment in trust for the benefit of all the creditors of said Daniel Leiby.

605] *In the answer, the respondents, George, Jacob, and Joseph Leiby, deny that they received any surplus under the foreclosure made by Phipps, on the property in Cincinnati; and they also deny that the mortgage made to them by Daniel upon said property, was without consideration, and for the purpose of defrauding and delaying creditors.

Respondents set forth, that the consideration for the mortgages was the liability of the said George, Jacob, and Joseph Leiby for the sum of \$8,188, besides interest, incurred by them as indorsers and securities for Daniel Leiby. Gardner Phipps, in his separate answer, stated that the mortgage given to him by Daniel Leiby, upon the property in Cincinnati, was to secure the payment of \$7,162.47, money before the date of the mortgage loaned by him to the mortgagor; that the premises were then incumbered by a mortgage to the Ohio Life and Trust Company, which respondent was compelled to redeem; that complainants were made parties and duly served with process, and that when the property was sold under the decree, it was purchased by him for \$6,196—out of which

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the Trust Company's lien of \$1,105 was paid, together with the costs of suit, and the residue applied upon the mortgage of the purchaser; and that no part of the balance remaining due on the mortgage has since been paid.

At the term of the Butler county common pleas, April, 1852, the cause was heard. The court found that the lien of Gardner Phipps upon the premises in Cincinnati was the prior lien; that the proceeds of the sale of said premises had all been distributed, and could not be reached. And they further found, that the mortgage given to George, Jacob, and Joseph Leiby, covered all the real estate held by Daniel Leiby in Butler county; and that it was an assignment by said Daniel, in trust, in contemplation of insolvency, and with a design to cover George, Jacob, and Joseph Leiby, John Shafer, Isaac Gardner, Gustavus W. Wampler, Samuel Lucas, and Aaron Russell, creditors of the said Daniel Leiby; and that it ought, in equity, to inure to the benefit of all the *creditors of Daniel Leiby, according to the amount of their claims, respectively. [606

The cause was carried to the district court, which found that the mortgage upon the property in Butler county was made in good faith, and valid; and that it gave a prior lien upon the premises to George, Jacob, and Joseph Leiby, John Shafer, etc. The complainants then preferred this bill of review, which was reserved in the district court.

Thos. Milliken, for complainants, made the following points:

I. That the mortgage is an assignment in contemplation of insolvency, with the design to prefer certain creditors to the exclusion of others. George, Joseph, and Jacob Leiby are the only grantees; and, after condition broken, Wampler, Shafer, Lucas, Gardner, and Russell, intended to be secured, could not have maintained an ejectment, nor have filed a bill to foreclose the mortgage. Their only remedy would be to file a bill in chancery to compel the grantees in the mortgage to execute the trust—to require them to foreclose the mortgage. *Mitchell v. Gazzam* and others, 12 Ohio, 335; *Doremus* and others *v. O'Harra* and others, 1 Ohio St. 45; *Atkinson v. Tomlinson* and others, 1 Ib. 241.

II. That Daniel Leiby did not convey his property to his brothers for the sole purpose of securing their debts; but went further, and interposed his brothers as trustees, to prefer creditors. Fas-

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sett & Co. v. Traber, 20 Ohio, 545; Brown et al. v. Webb, 20 Ib. 389.

Morris, Tilden, Rairden & Curwen, submitted the following propositions, and cited the following cases:

I. A mortgage is not an assignment; a mortgage creates a lien only in favor of the mortgagee. *Bates v. Coe*, 10 Conn. 294; *Henshaw v. Sumner*, 23 Pick. 446; *Low v. Wyman*, 6 N. H. 536; 607] *Barker v. Hall*, 13 Ib. 289; *Atkinson v. Tomlinson*, *1 Ohio St. 237; *Fassett v. Traber*, 20 Ohio, 540.

II. There must be an absolute, unconditional, irredeemable conveyance of the legal title; a parting by the debtor of all his interest, legal and equitable, in, and of all his power of control over, the specific property; a creation of a fund set apart by his act, and appropriated specifically by him to the payment of his debts, and untrammelled by any conditions that would delay that appropriation, or secure any advantages to the assignor. There must be an assignment.

III. The assignment must be coupled with a trust to pay creditors other than the assignee. A conveyance to a creditor, in payment of a debt, is not forbidden by the statute. This trust must be created in *express terms*, as in *Mitchell v. Gazzam*, to pay "such other debts of the assignor as Mitchell might prefer;" or it must be necessarily implied as matter of law, from the circumstances; as, where the conveyance must be treated either as a trust, or as a fraud, as in *Doremus v. O'Harra*, where the grantee held a judgment in his own name, in which he had no real interest, and took an assignment of notes and accounts, to be applied to the payment of that judgment.

IV. The assignment must be in trust to pay some of the assignor's creditors, and made at a time when he contemplates impending insolvency.

RANNEY, J. It is claimed, on the part of the complainants, that the mortgage made by Daniel Leiby to George, Jacob, and Joseph Leiby, brings the case within the provisions of section 3 of the act of March 14, 1838 (Swan's Stat. 717), relating to assignments of property by insolvent debtors, in trust, with the design of preferring some creditors to the exclusion of others; and that, in accordance with its provisions, the avails of the mortgaged property

should be divided, *pro rata*, among all the creditors of Daniel Leiby.. The statute provides that "all *assignments of property in [608. trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to inure to the benefit of all the creditors, in proportion to their respective demands."

The condition of this mortgage is as follows:

"Provided, nevertheless, and this deed is on this condition, to wit: Whereas, the said George Leiby, Jacob Leiby, and Joseph Leiby are indorsers and security for the said Daniel Leiby, in divers sums of money and debts, due and to become due from said Daniel Leiby to divers persons. Now, if the said Daniel Leiby, his heirs or assigns, shall well and truly pay, or cause to be paid, the said debts and sums of money as aforesaid, amounting to about the sum of seven thousand dollars, and shall also pay to Dr. Wampler, John Shafer, Samuel Lucas, Isaac Gardner, and Aaron Russell, all of Butler county, Ohio, the several sums of money owing by the said Daniel Leiby to them; then these presents shall be void and of no effect; otherwise, to be and remain in full force and virtue in law and equity."

That Daniel Leiby was insolvent at the time of its execution, and that it was designed to give the persons named in the condition a preferred lien upon nearly all the property he held, are not controverted facts. But it is very confidently claimed that a mortgage is not an *assignment* within the meaning of this act, and is in no way governed or affected by it; that a mortgage creates a mere lien upon the property mortgaged, and not a conveyance of it, and that the mortgagee is, in no just sense, a trustee, even for other creditors whose debts are secured by it. In support of these positions, the following cases are relied upon: *Bates v. Coe*, 10 Conn. 294; *Henshaw v. Sumner*, 23 Pick. 446; *Low v. Wyman*, 8 N. H. 536; *Barker v. Hall*, 13 Ib. 298.

It is evident the case depends upon the solution of two questions: Was the mortgage, in substance and legal effect, an *assignment, within the purview of this act; and if so, did it [609 invest the mortgagees with a valuable interest to be held for the benefit of a part only of the insolvent debtor's creditors? It is now well settled that the statute does not absolutely disable the insolvent debtor from using his property for the purpose of paying or securing individual creditors, while he leaves others unprovided

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for. This was so held in the early case of *Hull v. Jeffrey*, 8 Ohio, 390; and although some doubt was thrown over the subject by the case of *Mitchell v. Gazzam*, 12 Ohio, 315, it has been entirely removed by the subsequent cases. In these cases it has been determined that the statute does not affect a mortgage, given by an insolvent debtor, to secure the debt of one of his creditors, or to indemnify him against a liability, by indorsement or otherwise, assumed for the benefit of the debtor; although it may have the effect to prefer such creditor, and deprive others of the ability to obtain satisfaction of their claims. *Fassett v. Traber*, 20 Ohio, 540; *Doremus v. O'Harra*, 1 Ohio St. 45; *Atkinson v. Tomlinson*, 1 Ib. 237.

This statute was not designed to supply the place of a bankrupt or insolvent law, by compelling an equal distribution of the property of an insolvent debtor among his creditors; and the attempt to do so, by preventing him from using it in the payment or security of particular creditors, would have been little less than absurd, while it was confessedly within their power to obtain the same preference, by liens or levies, upon judgments confessed by him. Such a construction of the statute finds no warrant in its language, or the objects and purposes for which it was enacted.

To bring a case within the operation of the law, there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor other than himself.

But we are clearly of opinion that an assignment, by way of mortgage, may affect such transfer; and in such case the mortgagee becomes a trustee for such creditor or creditors, and liable to account to him or them for the interest so received. In no one of the cases decided in this state has this been doubted. On the contrary, it has been taken for granted; and where mortgages have been supported, instead of the short and conclusive answer being given that the instrument employed was not within the statute, the court has uniformly rested its judgment upon the solid reason that the mortgagee was not made a trustee for any other creditor. In exact propriety of language, it is very true a mortgage is not an assignment; nor when the same strictness is applied is an absolute conveyance of real property an assignment. But we are not construing a penal statute. This statute is of the most

beneficial character, and the uniform language of the court has been, that it ought to receive a most liberal construction. It promotes justice and equity, by compelling an equal distribution of the effects of an insolvent debtor among those equally entitled. It permits every creditor of such a debtor to reap the rewards of his diligence, where he does no more than to secure himself, but denies him the right to stand between the insolvent and some of his other creditors, and secure them a preference to the injury of those not provided for. It allows the debtor to use his property for the payment or security of any of his debts; but the moment he attempts to create a trust, with a preference for any of his creditors, by surrendering any of his property in any form, the statute steps in and declares it a trust for all. As soon as he puts any portion of his property beyond his power for such a purpose, the law deprives him of all ability to direct or control its ultimate destination. It deprived him of this power because it was found to be mischievous and unjust; and as the statute was passed to furnish the remedy, it should be so construed as to make it effectual. This can only be done by looking at its spirit and purpose, and holding cases falling within the mischief, intended to be remedied, to be within the act.

If, then, the mischief to be suppressed was the power that insolvent debtors before had of directing the application of [611 trust funds created by them, so as to secure preferences among their creditors, how can it make any difference in what manner the fund is created? That a mortgage is just as effectual as an absolute deed to create such a fund, just as fully disposes of the debtor's property, and secures the same inequitable preference to the favored creditors, and works the same wrong to those not preferred, can not be doubted. It could make no possible difference, either to the preferred creditors or those unprovided for, whether the debtor's property was appropriated in the one way or the other, while the debtor's power over the distribution of the fund, by simply changing the form of the instrument, would remain wholly unimpaired. With such a construction, it is not too much to say the statute is a perfect nullity. To give it such a construction is to suppose the legislature absurdly attempting to suppress a mischief in one form and leaving another, equally convenient and effectual, in which it might, with impunity, be accomplished.

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We do not deem it necessary to enter into any extended examination of the nature and effect of the mortgage deed, or of the respective interests of mortgagor and mortgagee in the property. It is enough that it enables the debtor to create a trust fund, in the hands of the mortgagee, for the benefit of some of his creditors to the exclusion of others, and that this is precisely what the legislature intended to deprive him of the power to do. But it is incorrect to say, that a mortgage does no more than to create a mere lien upon the property. It operates a conveyance of the estate, by way of pledge or security for the debt, and gives to the mortgagee the benefit of all the doctrines applicable to *bona fide* purchasers. 3 Kent's Com. 129. For a long time the mortgagee was only known as the owner, in courts of law; the rights of the mortgagor were only recognized in courts of equity. By the gradual adoption however, by the courts of law, of the rational 612] and just principles acted upon in equity, a harmonious *system has been constructed; and a mortgage is now treated, in both courts, as a mere security for the debt, and the mortgagee is permitted to use the legal title only for the purpose of making effectual such security.

It was with this view of the nature and character of a mortgage deed, that the case of *Bates v. Coe*, was decided. The statute of Connecticut, which, it was claimed, avoided the mortgage, provided that all *conveyances* and *assignments* in trust, made by debtors in failing circumstances, should be adjudged fraudulent and void as against their creditors, unless made for the benefit of *all* of them. The mortgage in question was made to a single creditor, and to secure a debt due to him. The court said the statute did not prohibit a mortgage, and that the conveyance was not in trust. The last position most clearly justified the judgment; and it may well be that the first is also tenable, in view of a statute that annulled the conveyance, and still have but a very remote bearing upon one like ours, which neither prohibits nor interferes with the transfer, but only acts upon the trust fund created by it; which yields to the debtor the power to make the transfer, out of which the trust fund is to arise, but simply denies him the right to confine its benefits to a part only of his creditors, and makes it *inure* to the benefit of all. The state of facts upon which the case of *Henshaw v. Sumner* was decided, is in no material respect different from that of *Bates v. Coe*, and the statute of Massachusetts is

substantially the same as that of Connecticut. The court held, that no trust for creditors was created by the mortgage, taken to secure the debt of the mortgagee; but it is nowhere intimated, that a mortgage given to secure the debts of creditors, other than the mortgagee, might not fall within the statute. On the contrary, they carefully guard themselves upon that point by saying, that "there was no reservation or appropriation of any portion of the mortgaged property, or its proceeds, to the use of any other individual than the mortgagees and mortgagor, or those who might subsequently acquire his *right." The cases cited from New Hampshire require no additional remark. [613]

After a very careful consideration of the subject in all its bearings, we are unanimously of the opinion that our statute requires us to hold that when any valuable interest of the insolvent debtor is transferred by any species of conveyance binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it inure to the benefit of *all* his creditors, and distributes the fund to all, in proportion to their respective demands.

As this mortgage was given, and the lien upon the debtor's property created, not only for the security of the mortgagees, but also of sundry other creditors of the mortgagor, it unquestionably falls directly within the principle stated, and subjects the mortgagees, who are invested with the legal title, to the liability of accounting, with the other creditors named, for a portion of the proceeds arising from a sale of the mortgaged property, whenever it may be made.

But it is claimed that the mortgage should be upheld as a valid security, so far as the mortgagees are concerned, whatever may be its character as to the other creditors named in it. We are of a different opinion. By consenting to become the recipients of this interest for the benefit of other creditors, they have voluntarily taken upon themselves the obligation of trustees for the persons named by the debtor, and when that is the case, the statute compels them to become trustees for all his creditors. And we are of opinion, that whenever the assignee is made by the terms of the instrument, or by necessary implication, a trustee for any one or more of the creditors, he becomes of necessity, by force of the statute, a trustee for all, and in respect to all the property transferred by it.

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The case of *Perry v. Holden*, 22 Pick. 269, is most express and decisive upon this point.

614] *In that case, the persons claiming the property had taken a mortgage, for the security of their own debt, of a part of the debtor's property; and a few hours later, a general assignment of all his property, for the benefit of all his creditors. The court held that the two instruments must be taken and construed together, as parts of the same transaction, and that both were void as against an attaching creditor;—the assignment, because the mortgage to which it was thus attached, and of which it became a part, created a preference; and the mortgage, because it could not be considered as an independent transaction, but as part of the assignment. If two separate instruments, resting in part upon distinct property, could be thus drawn together, and the fate of the one made to depend upon that of the other, and, indeed the one used to destroy the other, it would seem to be quite impossible to affect a separation, in the legal effect of the same instrument, covering the same identical property, and designed by the parties to effect one and the same purpose. Neither justice nor public policy require the attempt. If men see fit to lend themselves to enable an insolvent debtor to give a preference to some of his creditors to the certain injury of others, they can not well complain that they are not as well off as though they had not made the attempt to effect the injustice.

The view we have taken of this case makes it unnecessary to consider another objection taken to the mortgage, that it is void because of the uncertainty as to the amount of the debts referred to in the condition; and we therefore express no opinion upon that question.

The decree of the district court is reversed, and the cause remanded for further proceedings.

*GISHWILER ET AL. v. DODEZ.

[615]

In a proceeding upon habeas corpus, instituted by the father of an infant child, against the mother, who is living in a state of separation, to obtain its custody, it is error to reject evidence offered by him, either in the first instance, or by way of reply to evidence of qualification on her part, to show her unfitness to have the custody of the child.

In such a controversy for the custody of a child incapable of electing for itself, the order of the court should be made with a single reference to its best interests.

Neither of the parents has any rights that can be made to conflict with the welfare of the child.

RESERVED in the district court of Wayne county.

The cause originated by the issuing of a writ of *habeas corpus* from the probate court of Warren county, at the instance of Louis A. Dodez, who claimed the custody of Sophia Mary Dodez, his infant daughter. The defendants, here plaintiffs in error—Joseph Gishwiler, Sophia Gishwiler, and Sophia Dodez, mother of the child—resisted the application; and, upon hearing, the court found that the child was not unlawfully detained by the defendants, and ordered the custody of the child to be restored to them. Thereupon Louis A. Dodez filed a petition of error in the common pleas, alleging, as errors, that the court erred in rejecting the testimony by which the relator offered to prove, in reply to respondents' evidence, that the said respondents were, in many respects, unfit and unqualified to have the custody of said child; that its mother, Sophia Dodez, was in the habit of frequently getting drunk; that she was profane and obscene in her language; that she was a notorious liar, and had already openly taught said infant to lie and swear, and to hate any deny its father and his parents; that she was idle and prodigal, of an angry, revengeful, and ungovernable disposition, and that said *child would be in danger of bodily harm [616 if left with her; and that its proper education would be totally neglected, and the child trained to habits of idleness and vice by its said mother; and that the said Sophia Gishwiler, with whom said Sophia Dodez and child resided, was an ignorant, peevish and evil-disposed old woman, who followed necromancy and fortune-telling, with cards and other agencies, as a business, and that she taught the same to her own children, and all others within her control;

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and that she was dishonest, and taught her children to be so, and to utterly disregard their father's authority; and that said child, if left within her control, would be in great danger of bodily harm, and of being trained by her to habits of vice and error; and that the said Joseph Gishwiler, the husband of said Sophia Gishwiler, was a stupid, silly old dotard, under the absolute control of his said wife, without the privilege of exercising any authority, or doing or saying anything except as he was permitted by his said wife Sophia; and that he was not in his right mind, and in every respect utterly unfit to have the care and custody of said infant; and that all the respondents were unfit and disqualified, and improper persons to have the custody of said infant.

Defendant in error here also averred, as error, that the order of the court was for respondents, when it ought to have been for relator.

The common pleas reversed the decision of the probate court. Thereupon the plaintiffs filed their petition in error in the district court, and this writ issued. The case was reserved in the district court for decision here.

Jacob Brinkerhoff, for plaintiffs in error.

Given & Jeffries, and *McSweeney*, for defendant.

RANNEY, J. We find no difficulty in arriving at the conclusion that the probate judge erred in rejecting the evidence offered by the [617] defendant in error, and that the court of common *pleas decided correctly in reversing his judgment. The controversy arose between the parents of a female child, four and a half years of age, who are living in a state of separation, as to the right to its custody.

The proceeding was instituted by the father against the mother and her parents, in whose custody the child then was. After giving evidence tending to show that his wife left him without cause, and was living unjustifiably separate from him, and that he was an industrious man, of good habits and moral character, with abundant means to provide for and educate the child, and in every way suitable to have its custody, the relator rested his case. The respondents then gave evidence of their entire fitness for the discharge of the same duty, and of their willingness and ability to perform it. The relator, in reply, made what must be considered

exceedingly liberal offers, to show their utter unfitness to have the custody and training of the child, either with a view to its present safety or future welfare. This evidence was rejected by the court, upon what ground we are left to conjecture; but we suppose it to have been for the reason that it should have been given in the first instance, and could not properly be received in reply. This, we think, an application of strictness at the wrong time, and in the wrong place. In one view of the law, it is true, the evidence was unnecessary; but this same view shows the judgment, awarding the child to the custody of the mother, erroneous, while the claims of the father remained unimpeached. But if a more liberal view is taken, and the claims of the mother are placed upon a perfect equality with those of the father, it was equally wrong to have foreclosed inquiry as to the qualifications of either. Whatever difference of opinion may have obtained upon other points of this interesting and important subject, it is universally agreed that neither of the parties has any rights that can be made to conflict with the welfare of the child, and that the order of the court should be made with a single reference to its best interests. The contending parties may be fairly presumed to be more solicitous to gratify *their own interests and feelings, than to develop the whole [618 truth, with a view to the main object of the inquiry; while the child, incapable of judging for itself, and wholly unrepresented in the contest, is in danger of being overlooked. Under such circumstances, it is the duty of the judge to become its protector, and not only to listen to all the evidence produced by the parties calculated to throw light upon his path of duty, but also to inform himself from all other legitimate sources, the better to qualify himself to discharge understandingly the delicate trust.

The rules which regulate the order for producing proof, are rather rules of practice, intended to facilitate the transaction of business, than of evidence, and are never adhered to with unyielding tenacity when they would defeat the ends of justice. It is, however, by no means certain that any departure from these rules was proposed in the present case. After the husband had given evidence tending to show the wife wrongfully separated from him, and of his entire fitness to have the custody of the child, it would be going a great ways to say that the wife could retain it without any evidence of qualification on her part, or giving any reason, connected with the interests of the child, why it should remain in

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her custody; and if she was bound to give such evidence, his right to rebut it can not be questioned. But whether this was so or not, or whether the evidence might or might not have been rejected in an ordinary trial, we feel no hesitation in saying that such strictness can not be indulged in a proceeding partaking more of the character of an inquest than of a trial, and that the judge has no right to disable himself, by the intervention of any technicality, from hearing everything necessary to an enlightened discharge of his duty.

Another question of very considerable importance, and no little difficulty, may arise in the further progress of the case; but as it is not now necessarily involved, I do not propose to examine it fully.

When husband and wife are living in a state of separation, 619] *and each is equally well qualified, in every respect, to be intrusted with the custody and training of their infant children, should a court ever interfere, upon *habeas corpus*, to change the possession from the one to the other?

This question can only relate to children of such tender years as to be unable to elect for themselves; since, in other cases, it is well settled, that the court will go no further than to relieve them from all improper restraint. *Rex v. Deleval*, 3 Burr. 1434; *Matter of Wallstonecraft*, 4 Johns. Ch. 81. This subject was most elaborately considered, in the celebrated *Barry* case, by the courts of New York. It first made its appearance in the court of chancery in 1839 (8 Paige, 47), where it will be found reported under the title of *The People v. Mercien*. The child (a female of delicate constitution) was then but twenty-one months old, and was in the custody of the mother, at her father's house. There were two children of the marriage; the eldest (a boy) was already in the custody of the father, and this writ was prosecuted by him to obtain the custody of the other. Both the parties were highly respectable, and with abundant means to provide for the child. The chancellor, without expressing a definite opinion as to the legal rights of the father, in case the child could with safety be taken from the mother, arrived at the conclusion, that its tender age required the attentions of the mother, and that its safety and welfare were best promoted by having the custody with her.

This decision was made in August; and in October following, the relator prosecuted another writ before Judge Inglis, of the common pleas of New York, which, upon hearing, was dismissed;

the judge holding, that the proceedings before the chancellor were a bar to the further prosecution, as to matters in difference between the parties up to the time that order was made, and that nothing had since transpired to change their rights. These last proceedings being removed into the Supreme Court, the order of Judge Inglis was reversed. 25 Wend. 64.

Bronson, J., in delivering the opinion of the court, seems to *have waived the question as to whether the matter was *res* [620 *adjudicata*, up to the time the chancellor's order was made; but he held the judge to have erred in applying it to a writ afterward brought, and for a continued detention of the child. Upon the merits, the opinion of the court was clearly with the relator. Admitting, to the fullest extent, the right of the court, in the exercise of a sound legal discretion, to have regard to the welfare of the child, in determining the question of custody, they nevertheless insist, that the father, when no such consideration intervenes, "if he chooses to assert his right, has the better title to the custody of their minor children." The judge says: "I deem it well settled, that in the absence of any positive disqualification on the part of the father, for the proper discharge of his parental duties, and when there is no other special reason, touching the welfare of the children, for preferring the mother, the father has a paramount right to the custody, which no court is at liberty to disregard." . . . "In short, the claim of the father is preferred, until it plainly appears that the interests of the children require it to be set aside."

Upon a writ of error prosecuted in the court for the correction of errors, this judgment was reversed by a nearly unanimous vote, and the order of Judge Inglis was affirmed. 25 Wend. 83.

Only the chancellor and Senator Page delivered opinions; and while the former, when the case was before him in chancery, avoided the expression of a decided opinion upon the question I am now considering, he here very plainly indicates his non-concurrence in the doctrines advanced in the Supreme Court; and the latter, in an able opinion containing an extensive review of the authorities, thus states his conclusions:

"Upon a review of all the authorities binding upon the courts of this state, I have come to the undoubting conclusion that the right of the father to the custody of his child is not absolute, and that such custody is referrable to its interest and welfare, and is

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621] *to be selected by the court, in the exercise of a sound judicial discretion, irrespective of the claims of either parent. This conclusion, I believe, is warranted by the law of this state, as well as by the law of nature."

But this disagreeable (I might almost say unnatural) contest did not stop here. In 1842, the father prosecuted another writ in the Supreme Court, and that court still adhering to its former opinion, and regarding the judgment of the court of errors to have been founded alone upon the question of *res adjudicata*, by the concurrence of two judges against one, ordered the child restored to him. 3 Hill, 400.

A majority of my brethren think the law correctly stated by the Supreme Court of New York. I must hear further before I am prepared to come to this conclusion. It rather seems to me, that no active interference between father and mother is allowable, unless the good of the child demands it; and that, as a court would not take from the mother and commit to the custody of the father a child capable of electing, against its consent, it ought not to do it by an exercise of its judgment for one incapable, unless it is plainly seen that the welfare of the child will be thereby promoted. Whatever may be the rights of the father, in a claim for guardianship, or in a common-law action against third persons for harboring the child, I do not think that the custody of the mother of her infant child can be said to be either improper or illegal, so as to authorize the employment of the *habeas corpus*. The right of the father to the custody and services of his child are founded upon the correlative duty of supporting and maintaining it; but when this duty is assumed and discharged by the mother, both parties are remitted to their natural rights, as the authors of its being, and stand upon a footing of perfect equality.

While all will agree that a mother of unexceptionable character should not be deprived of the custody of a very young child, I can not believe that, because she may have reared it until others can bestow the necessary care and attention, it can be taken from her, 622] *and the feelings of both mother and child disregarded, for no better reason than that it is the sovereign will of her husband to do so.

The New York court, I am aware, is more than sustained by some recent English decisions; but there is very little in them to recommend them to adoption elsewhere. In the case of the *King v. Man-*

neville, 5 East, 221, the court of king's bench refused to interfere in behalf of a mother, from whom a child but eight months old and at the breast, had been taken by violence by the husband; and in *Skiinner's case*, 9 Moore, 278, where an infant child was kept from its mother, under the control of her husband and his mistress, with whom he was living in open adultery, all relief was denied. In the *King v. Greenhill*, 4 Adol. & Ell. 624, the children were in the custody of the mother, and upon the application of the father, who was living in adultery with another woman, were ordered to be delivered over to him. It was this case which called forth the eloquent denunciations of Chancellor Lyndhurst, in which he declared, that in the then state of the law, however virtuous and amiable the mother might be, and however brutal and profligate the father might be, the right of custody would nevertheless belong to him; and which led Lord Denman, who, as chief justice of the king's bench, had concurred in the decision, in a speech in the house of lords, to declare that "he believed there was not one judge who had not felt ashamed of the state of the law, and that it was such as to render it odious in the eyes of the country." The evil became intolerable; and parliament finally interfered, and passed an act restoring the mother to her natural rights, to be put upon an equality with her husband, in relation to the care and custody of her children, within the age of nurture. I am strongly disposed to think that the learned chief justice mistook a judicial excrescence upon the law, for the law itself, and that parliament did little more than restore it to its former condition.

The judgment must be affirmed.

***JOSEPH BOWRY & SONS ET AL. v. ODELL & BROTHER ET AL. [623**

A lien on property, subject to levy on execution, was not obtained by filing a bill, under the act of February 25, 1848, amendatory of the chancery practice act of 1831 (46 Ohio L. 96); therefore, such property, when not in the hands of a receiver, might be taken on the executions of third persons, notwithstanding the pendency of such a bill.

The pendency of an action at law was indispensable to authorize the filing of such a bill.

Bowry & Sons v. Odell & Bro. et al.

RESERVED in the district court of Montgomery county.

The bill, which was filed November 23, 1848, represents that complainants had, on that day, commenced an action in the court of common pleas against Odell & Brother, on a bill of exchange, and also on an account for goods sold, etc., and that said suit was then pending; further, that Odell & Brother were about to dispose of their stock of goods, consisting in part of goods bought of complainants, with intent to delay and hinder the collection of their said debt, and that the defendants had no other property, etc. The bill further states the facts upon which their belief is founded, and prays that the said Odell & Brother might be enjoined from any disposition of their property, credits, or effects, inconsistent with the security of complainants. The injunction was allowed by the court of common pleas, then in session. The writ was issued on the 29th of November, and served the same day. On the 30th of November, the defendants filed their answers, and moved the court to dissolve the injunction. The answers admitted the indebtedness charged in the bill, but denied that they were about to dispose of their stock of goods to hinder or delay complainants in the collection of their debts; and deny that they have no other property than their stock of goods, and averred that they have and own a 624] bindery, worth \$300, and *a wagon and horses, worth at least \$400, in addition to their stock of goods, which they valued at about \$3,000. On the 16th of December, the motion to dissolve the injunction was overruled. At the same term, the defendants produced, by their attorneys, three warrants of attorney, executed by Odell & Brother, to confess judgments, as follows: one in favor of E. O. Goodman, for \$864.56, purporting to have been executed September 20, 1848; one in favor of Parrott & Clegg, for \$147.54; and one in favor of James Odell, Sen., for \$500. Upon these warrants, judgments were entered against the defendants, and on the 29th of December, the plaintiffs, in said judgments, had execution issued thereon, which were levied upon the stock of goods, bindery, and wagon and horses aforesaid. These were sold by the sheriff, realizing the sum of \$1,386.

At April term, 1849, complainants obtained a judgment on the claim mentioned in the bill, in the action which had been commenced thereon, for \$271.91. On this execution was issued, and returned by the sheriff, "no goods, chattels, lands, or tenements whereon to levy." In May, 1849, complainants filed a motion for

the distribution of the proceeds of the sale of the effects, levied on by virtue of the former executions, which, after argument, the court overruled. At the August term, 1849, complainants obtained a rule, calling upon the defendants to show cause why an attachment should not issue against them for violating the injunction. Answers having been filed, the rule was discharged. On the 23th of November, 1850, complainants filed a supplemental bill, making E. O. Goodman, Parrott & Clegg, and James Odell, Sen., defendants, and praying a decree against them for so much of the proceeds of said sale as will satisfy the judgment and costs recovered against Odell & Brother. The defendants demurred. The demurrer was overruled, and the defendants answered.

At the term of November, 1852, the court entered a decree in favor of the complainants, against E. O. Goodman, for \$188.26; *against James Odell, Sen., for \$109.25; and against Parrott & Clegg, for \$35.20—making the sum found to be due to the complainants \$339.91. From this decree the defendants appealed, and the district court reserved the case.

Lowe & Forsyth, for complainants, contended that the injunction was the proper remedy, and the only available one by which complainants might secure their claim; that complainants had, by their bill, acquired an equitable lien upon the goods of the debtor, which was prior to the lien of a subsequent judgment; that the statute authorizes the issuing of an injunction to restrain the defendant in the suit at law from disposing of his property, as well as those having his property in custody. Cited vol. 5 Western Law Jour. 467; *Gurney v. Tannenwald*, 18 Ohio, 481.

E. W. Davis, for defendants, advanced the following propositions: No suit was pending when the bill was filed, the action at law not having been commenced until the day after the filing of the bill. The bill is defective, in not setting forth sufficient grounds for the injunction. The affidavit is insufficient. The complainants obtained no prior lien by virtue of the original bill.

THURMAN, C. J. As the goods mentioned in the bill have been sold since it was filed, upon the executions of certain of the defendants, the bill must be dismissed for want of a subject for a decree to operate upon, unless the complainants, by filing their

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bill, obtained a lien preferable to those acquired by the levies of the executions. If they did, they had a right to be first paid out of the proceeds of the sales, and are entitled to a decree for the sum due them, against the execution creditors, who received the whole proceeds, the proceeds being sufficient to satisfy the complainants' claim.

The filing of a creditor's bill and service of process after a 626] *judgment at law, under the 16th section of the chancery practice act of 1831 (Swan's Stat., old ed. 704), gave a lien by the express terms of that section; and even without an express provision to that effect, a lien would thereby have been created, probably, by the known rules and usages of equity. Hence the existence of such a lien has been frequently recognized by our courts. *Douglas v. Huston et al.*, 6 Ohio, 156; *Miers & Coulson v. Zanesville & Maysville Turnpike Road Co.*, 13 Ohio, 197.

But it has never been held, so far as we are advised, that a lien upon property subject to sale upon execution, was created by the filing of a bill under the 15th section of the act, or under the amendatory act of 1848. 46 Ohio L. 96.

Nor are we able to perceive any sufficient ground upon which to claim such a lien. It finds no support in the usages of courts of chancery, for, independent of statutory provisions, the proceeding is unknown to those courts. A bill to reach property not liable to legal process, and subject it to the payment of a judgment, is now a well known equitable remedy, however much it may once have been questioned; but not so a bill to enjoin a disposition of effects until a judgment can be obtained. The former needs no statute to support it; *Bayard v. Hoffman*, 4 Johns. Ch. 450; but the latter is the mere creature of the statute. Looking to the statute, then, we find no provision in it giving a lien in a case like the present. The object seems to have been to restrain a disposition of property until a judgment could be obtained and an execution be levied upon it. It was not intended to dispense with an execution where the property was subject to that process. It was not intended that a creditor, by filing a bill like that before us, should be able to tie up all a debtor's property, so that no other creditor could reach it during the pendency of the bill. Such a provision would be extremely pernicious, and open a wide door to collusion and fraud.

We are therefore of opinion that the complainants, by filing

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their bill, obtained no lien upon the goods in question; that they *were well taken upon the defendants' execution, and the [627 execution creditors are entitled to their proceeds.

It may be well to remark, in order to guard against misapprehension, that we express no opinion upon the question, whether a lien upon equities, or choses in action not subject to execution at law, might be obtained by filing a bill under section 15 of the act of 1831, or the act of 1848. Upon such a bill a decree might be taken, after judgment recovered, subjecting such equities or choses in action, to its payment, as upon a bill filed under section 16. *Gurney v. Tannenwald*, 18 Ohio, 486. Consequently, there is much reason, in such a case, for claiming a lien; but as the question is not before us, we do not decide it.

There is another objection equally fatal to the complainants' case. Their bill was filed and injunction obtained before their action at law was commenced. But by the express provisions of the statute, the pendency of an action is indispensable to authorize the *filing* of such a bill. A common-law action can not be said to be pending before *mesne* process is issued, and there is nothing in the proofs before us to show that process, in the complainants' action at law, was issued before November 29. Their bill was filed and injunction allowed November 28.

It being unnecessary to decide the other questions argued by counsel, we express no opinion upon them.

Bill dismissed.

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COMPANY.

The courts of this state, in a proper case, have the power to take the evidence given by the plaintiff from the jury, and order a peremptory nonsuit.

Such a motion involves an admission of all the facts which the evidence in any degree *tends* to prove, and presents only a question of law, whether each fact, indispensable to the right of action, and put in issue by the pleadings, has been supported by some evidence.

If it has, the motion must be denied; as no finding of facts by the court, or weighing of the evidence, is permitted.

Money paid upon a mistake of facts, and without consideration, may, as a general rule, be recovered back.

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A well-settled exception to this rule occurs when the payment is made by the drawee of a forged bill or check, to a holder, for value and without fault, and the money can not be returned without prejudice to him.

The exception rests upon the supposed knowledge of the drawee of the drawer's signature, and the negligence imputed to him for paying the paper, without sufficient inquiry as to its genuineness.

But this exception does not apply when, either by express agreement or a settled course of business between the parties, or by a general custom in the place and applicable to the business in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and, by his negligent failure to perform it, has contributed to induce the payee to act upon the paper as genuine, and to advance the money upon it.

Nor does it apply in any case where the parties are in a mutual fault, or where the money is paid upon a mistake of facts, in respect to which both were bound to inquire.

In a case of money paid upon a forgery, not falling within the exception, and governed by the general rule, it is sufficient to give notice when the forgery is discovered.

ERROR to the Superior Court of Cincinnati.

The original action was one of assumpsit, brought in the court of 629] common pleas of Hamilton county, December 29, 1852, but *removed to the Superior Court of Cincinnati, by consent of parties, May 11, 1854. The declaration is for money had and received, money paid, money lent, and money found to be due on an account stated. The plea is the general issue.

On the 14th of June, 1854, at a special term of the Superior Court, held by the Hon. Bellamy Storer, the cause came on to be tried by jury. When the plaintiffs had produced all their evidence and rested, the defendants moved for a nonsuit, which, after argument, was granted. Whereupon, a bill of exceptions, presenting all the evidence, was signed by the judge and made part of the record. The plaintiffs filed their petition in error to the Superior Court, at the general term of the Superior Court, October, 1854; assigning for error, that the court, at special term, erred in rendering said judgment of nonsuit. The Superior Court, at general term, affirmed the judgment at special term. To reverse this judgment of affirmance, the present petition in error is filed on leave.

The facts sufficiently appear in the judgment of the court.

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Fox, French & Pendleton, and Walker & Kebler, for plaintiff.

Timothy Walker made the following points, and cited authorities below :

I. That a court in Ohio can not, by ordering a peremptory nonsuit, refuse the plaintiff the chance of a verdict, if he insists upon it, when he has once offered evidence bearing upon the case. 3 Black. Com. 316, 376; 3 Bouvier's Inst. 530; *Elmore's Lessee v. Grimes*, 1 Peters' S. C. 469; *De Wolf v. Rabaud*, 1 Peters, 476; *Crane v. Lessee of Morris*, 6 Ib. 598; *Foote v. Silsby*, 1 Blatchford, 445; *Silsby v. Foote*, 14 Howard, 218; *Irving v. Taggart*, 1 Serg. & Rawle, 360; *Girard v. Gettig*, 2 Binney, 234; *Mitchell v. New England Ins. Co.*, 6 Pick. 117; *French v. Smith*, 4 Vt. 363; *Smith v. Crane*, 12 Ib. 487; *Hunt v. Stewart*, 7 Alabama, 525; *Martin v. Webb*, 5 Pike, 72; **St. Louis Ins. Co. v. Soulard*, 8 Missouri, 665; *Wells v. Gaty*, 8 Ib. 681; *Davis v. Hoxey*, 1 Scammon, 406; *Booe v. Davis*, 5 Blackf. 115; *Coxe v. Field*, 1 Green, 215; *Bartow v. Brands*, 3 Ib. 248; *Foster v. Dixfield*, 6 Shepley, 380; *Sandford v. Emery*, 2 Greenl. 5; *Pratt v. Hull*, 13 Johns. 334; *Thompson v. Dickinson*, 12 Barbour, 108; *Scruggs v. Brackin*, 4 Yerger, 528; *Thweat v. Finch*, 1 Wash. Va. 114; *Brown v. Frost*, 2 Bay, 126; *Sliphen v. Fisher*, 11 Ohio, 299; *Powell v. Janes*, 12 Ib. 35.

II. That the evidence given established the following propositions:

1. That the purchase of these checks, in the manner before stated, was not only a departure from the general usage of banks, but from the usage of that particular bank, and from all rules of prudence.

2. That independently of any usage, there was gross negligence, amounting to recklessness, in making so large a negotiation without any inquiry as to the genuineness of the checks, or the right of the stranger to them.

3. That if either of these checks had been presented by *this stranger*, at the counter of the bank upon which it was drawn, it would not have been paid.

4. That the usage of bankers, to receive from *their depositors* checks taken by them on other banks, is merely an accommodation to them, as customers, and in no way analogous to the purchasing of such checks from a stranger.

Therefore the plaintiff ought to recover upon either one of these grounds:

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1. The loss was occasioned wholly by the negligence of the defendants.

2. There was a total failure of consideration.

3. The money was paid under a mistake.

He referred to and commented upon the following cases and authorities: *Gill v. Cubitt*, 3 Barn. & Cress., 466; 3 **Kent's Com.* 80, 82; *Crook v. Jadis*, 27 Eng. Com. Law 234; 5 Barn. & Ad. 911; *Backhouse v. Harrison*, 27 Eng. Com. Law, 276; 5 Barn. & Ad. 1098; *Goodman v. Harvey*, 31 Eng. Com. Law, 212; 4 Adol. & Ellis, 870; *Etter v. Rich*, 37 Eng. Com. Law, 232; 10 Adol. & Ellis, 784; *Levy v. Bank United States*, 4 Dall. 234; 1 Binn. 27; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vt. 141; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 Comstock, 230; *Goddard v. Merchants' Bank*, 4 Ib. 147; *Hall v. Wilson*, 16 Barbour, 584; *Price v. Neale*, 3 Burr. 1354; *Young v. Adams*, 6 Mass. 182; *Markle v. Hatfield*, 2 Johns. 455.

Fox, French & Pendelton claimed:

I. That the court had no power to arrest the evidence from the jury and direct a nonsuit.

II. If the court had such power, when there was a total want of testimony to support the plaintiff's claim, it was improper to order a nonsuit in this case, because there was sufficient evidence in the cause to sustain the action.

They claimed the evidence showed that, by the course of dealings between bankers in Cincinnati, checks presented by one bank, drawn by individuals on other banks, were always received from the bankers, presenting them in bundles, with a ticket-mark on the back stating the amount of checks, with an understanding that they need not be examined at the time of acceptance, but might be examined after bank hours; that this usage amounted, in fact, to an assurance or warranty that all the checks embraced in the bundle were genuine, and, therefore, the party paying money on the faith of this representation had a right to recover it back if the checks were not genuine. 4 Comstock, 147.

III. That although they admitted the general rule to be well settled, 632] that the drawee of a check or draft was bound, by the *law merchant, to know the handwriting of his correspondents, when he

had an opportunity to examine the handwriting, yet the rule did not apply to cases where a draft was paid without an opportunity of seeing the signature; nor did it apply to the present case, where, by the usual mode of dealing between bankers, the signatures to the checks are not expected to be examined at the time they are paid, but, on account of facilitating business, the payment is made with an understanding that a subsequent examination may be made. Counsel cited the following authority to sustain his view: 4 Comstock, 147; 10 Eng. Com. L. 143; 44 Ib. 641.

IV. That plaintiffs claimed that the right of the plaintiffs to recover in this case, depended upon the question of negligence. As a general rule, where money is paid by mistake, it may be recovered back. But if the party paying back were guilty of negligence in paying the money, and that negligence had been the cause of loss to the party receiving it, the money could not be recovered back. If, on the contrary, the party receiving the money had, in the purchase of the check (as in this instance), acted negligently in purchasing from a stranger, and this negligence had tended to the injury of the plaintiff, the defendants must refund the amount received; that, in fact, most of the cases of forged instruments depended upon the question of negligence. They claimed that the defendant was guilty of negligence, in purchasing from a stranger without inquiry into his character, or without crossing the street and presenting the check to Ellis & Morton, to know whether it was good; that, if they had taken this precaution, the forgery would have been discovered and loss prevented. The negligence of the defendants, therefore, caused the loss. 10 Wheaton, 333; 1 Hill, 290; 17 Mass. 42.

V. That notice of the fact of the check being forged was unnecessary in this case in order to enable the plaintiffs to recover back the money paid, because there was no party on the check to whom the defendants could have resorted for payment, even if *notice [633 had been given on the same day; and in all such cases the plaintiff is not required to give notice. But all the law requires is a notice as soon as the forgery is discovered, which was given in this case: citing 4 Comstock, 151; 3 Mass. 74; 10 Eng. Com. L. 140; 9 Barn. & Cress. 902; 6 Taunt. 80; 17 Eng. Com. L. 519.

Worthington & Matthews, made the following points for the defendants:

*Ellis & Morton v. Ohio Life Ins. & Trust Co.*1. *On the power of the Court to order a nonsuit.*

I. In all cases where a nonsuit may be directed by the court, by reason of the irrelevancy of testimony, or by reason that the testimony adduced does not support the case set forth in the declaration, and also, whenever the testimony shall be arrested from the jury, by reason of which the plaintiff becomes nonsuit, the plaintiffs shall have the same right of appeal as in other cases. Sec. 96, Prac. Act of 1831, 3 Chase Stat. 1686; sec. 89, Prac. Act of 1824; 2 Chase Stat. 1274; sec. 91, Prac. Act of 1816, 2 Chase Stat. 969; sec. 3, Act to amend, etc., 1813, 2 Chase Stat. 794.

II. In all cases pending, etc., either party shall have a right to except to the opinion of the court, on a motion to direct a nonsuit, and to arrest the testimony from the jury, etc., so that the case may be removed by writ of error. Sec. 3, Act to regulate, etc., of March 12, 1845, 43 Stat. 80.

III. Every special verdict or demurrer to evidence shall be entered on the minutes of the court; after which either party may move the court to assign a day for argument. Sec. 84, Prac. Act of 1831, 3 Chase Stat. 1684; sec. 81, Prac. Act of 1824, 2 Chase Stat. 1273; sec. 83, Prac. Act of 1816, 2 Chase Stat. 963; sec. 96, Prac. Act of 1810, 2 Chase Stat. 717.

IV. The act establishing courts of judicature of 1795 was adopted 634] from Pennsylvania, and is very general in its terms. *The act organizing judicial courts of 1803, and that of 1805, are also very general, and doubtless the practice act of 1810 was founded upon what had been the course of procedure by the courts under the prior acts. It has been substantially followed by the subsequent acts up to the time of the present code. Prac. Act of 1810, 1 Chase Stat. 703; Prac. Act of 1805, 1 Ib. 450; Prac. Act of 1803, 1 Ib. 355; Prac. Act of 1795, 1 Ib. 147.

V. At an early period in the judicial history of Ohio, it was determined that an appeal could not be sustained on a judgment of nonsuit, because it did not conclude the rights of the parties, and this probably induced the act of 1813, amending the practice act of 1810. 2 Ohio, 87; 9 Ib. 192.

VI. "The act of Assembly, 29 Ohio St. 75 (sec. 96, Prac. Act, 1831), provides for an appeal, where the court orders a nonsuit by reason of the irrelevancy or insufficiency of testimony to support the plaintiff's declaration, and where nonsuit results from the court's arresting the testimony from the jury. All these cases, which are

exceptions from the common rule, suppose the interposition of the court. This is essential to the appeal. The case before us shows no such interposition. The common rule does not allow an appeal from a voluntary nonsuit." 6 Ohio, 496.

VII. Section 96 of the practice act of 1831, was intended to allow an appeal as in other cases, where the court decided a nonsuit, by reason of irrelevancy, etc., but in no other case. It was introduced into our system by the judiciary act of 1813, and has been since continued. Without it, no appeal would lie upon a nonsuit at law. In chancery the statute is different. 9 Ohio, 192.

VIII. The court never hesitates to arrest a trial, at any stage of the proceedings, when it is discovered, if a verdict be taken, the judgment must be arrested. Any other course would be a useless delay of time, which the technical forms of proceeding should not be suffered to produce unless in very special cases. 11 [635 Ohio, 302.

IX. Whenever it appears, in the progress of a trial, that the plaintiff is not entitled to maintain his action, the court may interpose and direct a nonsuit, although the same objection appears upon the face of the declaration, and might have been made on demurrer, etc. This was a case where the court, on motion, arrested the testimony from the jury and directed a nonsuit; because a justice of the peace had no jurisdiction over a constable for a false return on mesne process. This was an objection to the declaration. 12 Ohio, 41; 1 Camp. 256.

X. A nonsuit will not be set aside, though improperly directed, unless a verdict in favor of the plaintiff will lay the foundation for a legal judgment. In this case a deed was ruled out and a nonsuit ordered. The cases in 11 Ohio, 302, and 12 Ohio, 41, are cited and affirmed. 14 Ohio, 606.

XI. In the case of *Showers v. Emery's lessee*, a nonsuit had been granted and judgment. On a writ of error it was reversed, because the evidence adduced tended to prove the plaintiff's claim. The court said even the presumption of a fact must be left to a jury, and the court can not compel the plaintiff to become nonsuited. 16 Ohio, 296. See also, in *Warring v. Martin*, Wright, 380.

XII. The Supreme Court will not reverse the judgment of the court of common pleas for error in refusing to grant a nonsuit, unless the bill of exceptions discloses all the testimony which was before the court on the motion for a nonsuit. A reversing court never

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presumes that an inferior tribunal has erred. The presumption is, it has not. Until the contrary be shown by record, every court is presumed to have decided correctly. 17 Ohio, 439, 497, 498; 18 Ib. 30; 19 Ib. 426; 20 Ib. 361.

XIII. Error can not be assigned upon any ruling of the court in the progress of a trial, unless by the bill of exceptions it appears that an exception was taken to such ruling. 19 Ohio, 300; 20 Ib. 34.

636] *XIV. In the progress of a trial, if a motion to direct a nonsuit be made to the court, it must be decided; and to the decision upon the motion each party has the right to except. 19 Ohio, 301.

XV. A bill of exceptions must be signed, sealed, etc., at the term in which the exception is taken. 19 Ohio, 426.

XVI. If the court, supposing the evidence all true, were of opinion it fell short of establishing a legal right in the plaintiff to recover, it had the legal right to order a nonsuit. Wright, 335; Ib. 337; Ib. 489.

So if the evidence do not conduce or tend to establish every fact involved in the issue. 17 Ohio, 42, 43; 1 McLean, 309; 10 Eng. C. L. 152; 3 Barn. & Cress. 462.

XVII. If the plaintiff, having made a *prima facie* case, introduce other testimony showing the fact to be contrary to the supposed case, and against the plaintiff, he will be nonsuited. No inference can obtain against a fact. Or in the language of the court "nonsuits are ordered when there is a total failure of evidence to sustain the plaintiff's claim, and when taking all the evidence he offers as true, it shows in him no legal right to a verdict." Wright, 661.

XVIII. The majority of the Supreme Court of the United States hold the circuit court has no authority to order a peremptory nonsuit against the will of the plaintiff. He has a right by law to a trial by a jury, and to have the case submitted to them. It was in a case from Georgia. Johnson dissented, because the sixth circuit over which he presided had adopted the practice of the state courts, and it was their practice to grant such nonsuits. 1 Pet. 471, 497; 6 Ib. 609.

The two latter cases rest upon the former. 14 How. 222.

This case rests upon the preceding cases.

In these cases the evidence all conduced to sustain the issue, and
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the nature and effect or weight of the testimony should have been left to the jury. It is in such cases the plaintiff has the [637 right by law to a trial by a jury. 16 Ohio, 296; Wright, 380; 6 Peck, 117; 12 Barb. 108; 1 Wash. (Vir.) 114; 2 Bay, 126; 13 Johns. 334; 4 Cush. 416; 5 Cush. 67; 14 Penn. St. (2 Harris) 197; 2 Hen. Black. 205.

XIX. When there is no dispute about the facts proved, no testimony to be weighed, and the facts proved fall short of the legal proposition upon which the plaintiff seeks to maintain his issue, or, in other words, when there is a defect in the testimony, the court will nonsuit him. There is no testimony tending to sustain all the facts, or some one fact necessary to the issue. 13 Johns. 334; 12 Ib. 298; 1 McLean, 309; 4 Cush. 414; 17 Mass. 33; 14 Barb. 585; 13 Ib. 9; 10 Ib. 663; 3 Hill, 287; 7 Ib. 529; 21 Wend. 623; 17 Ohio, 42, 43.

The latter case is very conclusive. It was an action against an indorser, where no demand of payment was proven, and a nonsuit ordered. The court held—"the indorser acknowledged notice of non-payment, but there was no evidence of demand of payment. There was no sufficient evidence then to take the case to the jury, either upon the special counts or general counts." So the case in 1 McLean, 309.

XX. When the defendant offers testimony in defense, he waives his nonsuit rights. 32 Maine, 576; 14 Mass. 154; 5 Cush. 67. Otherwise in New York. 10 Barb. 663; 3 Hill, 287; 7 Ib. 529; see also 6 Barn. & Cress. 225, or 13 Eng. C. L. 152; 11 Ohio, 302; 12 Ib. 41; 14 Ib. 606.

XXI. It is enough to warrant a nonsuit, that the clear weight and effect of the defensive testimony is against the plaintiff. Wherever the case is so clear the court would grant a new trial if a verdict be for the plaintiff, it may order a nonsuit, and when so ordered, a new trial will not be granted. 10 Barb. 663; *3 [638 Hill, 287; 7 Ib. 659; 23 Wend. 480; 21 Ib. 109; 14 Ib. 146; 6 Ib. 436; 1 Ib. 376, 379; 6 Barn. & Cress. 225; 1 Iowa (Greene), 259; 2 Ib. 205.

XXII. On a motion for a nonsuit the court takes into consideration the whole testimony of the plaintiff, whether given on cross-examination or in chief. 30 Maine (17 Shep.), 58; 5 Dana (Ky.), 419; 3 Marsh. (Ky.) 277; 21 Maine (9 Shep.), 256.

XXIII. A demurrer to evidence involves the admission by the

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demurrant of every fact claimed to be sustained by the plaintiff's evidence, otherwise he can not be compelled to join in the demurrer, nor can the case be withdrawn from the jury; but admitting all the facts claimed to be established by the evidence, there is nothing for the jury to find, and the court will apply the law to the facts admitted and render judgment. 2 Hen. Black. 187, 205; 1 Doug. 119; 11 Wheat. 171, 320; or 6 Con. Pet. 261, 328; 22 Peck, 135; 3 Phil. Ev. (C. & H. Notes) 796; 3 Pet. 36, 96.

XXIV. If the party against whom the demurrer is offered, join in the demurrer, neglecting to insist on the admissions he claims, the court will draw from the testimony what the jury might have drawn, if it leave the facts not unsettled. 3 Phil. Ev. (C. & H. Note) 796; 12 Wheat. 383, 389; 6 Con. Pet. 546, 328.

XXV. Whether evidence be admissible or not, relevant or not, or conclusive or not, to support the issue, must be for the court to determine. The legality of evidence is a matter of law and for the court to settle. The effect of legal testimony admissible to a jury must be for the jury to ascertain. But before evidence can go to a jury the court must act upon its competency or tendency to support the issue. 1 Greenl. Ev., sec. 2; 2 Pet. 44, 133, 148.

639] *2. *Was the power properly exercised in this case?*

I. Where an act is done, or contract made, under an injurious mistake, or ignorance of a material fact, it is voidable. This rule is not limited to cases of fraudulent concealment and suppression, but extends to cases of innocent misapprehension and mistake. The mistake or ignorance must be an essential and efficient cause, and not a circumstance. Story on Contracts, sec. 409, 411; 9 Peck, 129; 9 Mees. & Welsb. 54; 11 Conn. 143; 2 Sumner, 387, 394; 3 Story, 700; 1 Story Eq. Jur., sec. 140, 141; 2 Kent Com. 490, 491.

II. It was formerly held that any mistake or ignorance, which might, by the exercise of reasonable diligence, be obviated, would be insufficient to avoid a contract; but now a plain and palpable mistake or ignorance will entitle the mistaken or ignorant party to relief, unless he be put directly upon inquiry; and then it must be such as could not be found out by due diligence. But no relief will be given where the means of information are open or closed to both parties. 1 Story on Contracts, sec. 410; 1 Story Eq. Jur., secs. 146, 149, 150, 151; 2 Kent Com. 484; 1 Ohio, 450; 3 Story, 181; 20 Ohio, 581, 607; 20 Wend. 174; 8 Cowen, 195; 9 Mees. & Welsb.

54; 43 Eng. C. L. 16, or 4 Man. & Grang. 11; 2 East, 469; 13 Eng. C. L. 293, or 6 Barn. & Cress. 671.

III. Anything that puts you upon inquiry is notice in the law. The presentation to a banker of a bill drawn by his correspondent, puts him upon inquiry at once as to the genuineness of his signature, and is notice. 8 Barb. 521; 1 Gall. 41; 7 Conn. 324; 18 Ib. 108; 16 Ohio, 83, 415.

IV. There are exceptions to these rules:

1. Where the party making the mistake willfully assumes the fact, or declines to examine into it when his attention is called to it. Story on Contracts, sec. 411; 9 Mees. & Welsb. 54.

*2. When the mistake or ignorance relates to matters which [640] the party is bound by law imperatively to know, unless fraud or imposition were directly practiced upon him. This exception applies solely to cases where public policy requires the party mistaken to bear the consequences of his mistake, and when the other party is not in fault; such as the payment of bank-notes or bank-checks under a mistake. Story on Contracts, sec. 411; 4 Dall. 234; 10 Wheat. 333; 17 Mass. 33.

3. So, also, if a banker receive in payment his own notes, that prove to be counterfeit, because he is bound to know his own notes on presentation. Story on Contracts, sec. 411; 10 Wheat. 333; 17 Mass. 33.

4. So, also, if a banker pay a counterfeit bill or check drawn on him, it is an admission of the genuineness of the signatures of the drawers; the law binds him not only to know his own signature, but also the signatures of his correspondents. 10 Vt. 141; 4 Comstock, 147; 3 Ib. 230, 236; 1 Hill, 287, 290; 10 Wheat. 333; 4 Dall. 234; Story on Contracts, sec. 411; Story on Bills, secs. 262, 263; Ib., secs. 450, 451, note 2; Ib., sec. 411; 42 Eng. C. L. 634, or 2 Adol. & Ell. 204; 10 Eng. C. L. 140, or 3 Barn. & Cress. 428; 17 Eng. C. L. 577, or 9 Barn. & Cress. 902; 1 Eng. C. L. 312, or 6 Taunt. 76; 1 W. Black. 390; 3 Bur. 1354; 1 Strange, 548; 2 Ib. 946, 1051; 1 D. & E. 655; 3 Esp. 60; 4 M. & Selw. 15; 4 Esp. 226; 12 Eng. C. L. 368, or 5 Barn. & Cress. 750; 2 Johns. 462; 17 Mass. 33, 42; 6 Ib. 182; 10 M. & W. 147.

5. But where he who takes a forged bill, note, or check, is not a party to it, the rule is totally different; the law then does not require him to know the signatures thereto. Story on Contracts, sec. 411; Story on Bills, secs. 111, 225, 262, 263, 413, 451; 5 Taunt. 535

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448, or 1 Eng. C. L. 153; 5 Taunt. 495, or 1 Eng. C. L. 170; 5 **641**] Taunt. 488, or 1 Eng. *C. L. 166; 9 Barn. & Cress. 905, or 17 Eng. C. L. 517; 3 Barn. & Cress. 428, or 10 Eng. C. L. 120; 3 Comstock, 230; 1 Hill, 290; 6 Mass. 184.

6. The payment of a forged check is a matter of negligence, and not to be considered as a mistake. 3 Bur. 1357.

V. A bill of exchange is well devised for circulation. The law throws its mantle over it, and he to whom it is tendered has simply to read it; he need look no further; and its private history is of no moment to him. The policy that introduced this simple instrument has hitherto protected it, and it goes on its mission unembarrassed by the acts of the parties through whom it is transmitted without notice of any infirmity. 1 Hen. Black. 607; Swan's Stat. (1854) 575; Story on Bills, secs. 189, 190, 191, 192, 193. This, of course, does not include illegal bills.

VI. A consideration to support a bill consists either in some right, interest, profit, or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility, or act, or labor, or service on the other side. Story on Bills, sec. 183.

VII. A bank check is always payable on demand, and days of grace do not attach to it. The holder of a check on presentation has a right to have it paid, and if not paid to proceed at once against the antecedent parties, even though he may fix their legal liability the next day, and of this right he can not be deprived without his consent. 21 Wend. 373; 35 Ib. 674; 1 Eng. C. L. 316; 6 Taunt. 76; 17 Eng. C. L. 518; 9 Barn. & Cress. 902; 3 Ib. 428; 10 Eng. C. L. 140.

VIII. Where parties are equally innocent or equally guilty, the rule is *melior est conditio possidentis*, except in innocent mistakes; then it is reversed. 1 Mass. 66; 3 Bur. 1354; 5 Coke, 115; 10 **642**] Wheat. 333; 1 Hill, *290; 2 Doug. 639; 1 Eng. C. L. 169, Dallas, J.; 12 Ib. 121.

IX. Where a bank receives a check from another bank and sends it to a third, averring it was received from the latter bank, which proves not to be the case, the loss consequent must fall upon the erring bank as first in fault. 3 Mass. 74.

X. Payment made in forged notes of third parties, or in base coin, is not good, but they must be returned in a reasonable time. The true rule is for the party receiving them to examine them as

soon as there is an opportunity, and return them immediately. This applies to all cases, and especially to one's own notes received with a reservation to return if not good on examination. Story on Contracts, sec. 411, note 2; 10 Wheat. 333; 17 Mass. 33; 6 Ib. 182; 2 Johns. 455; 3 Taunt. 488; 1 Eng. C. L. 166.

XI. The drawee of a forged check by him paid, can not recover the amount back from the holder of the check upon the ground of failure or insufficiency of consideration, if the holder had acquired the check in good faith and for value received. 42 Eng. C. L. 684; 2 Adol. & Ell. 196.

XII. The holder of a bill or bank check fraudulently, feloniously, or without consideration obtained and put in circulation, must have acquired it in good faith for a full and fair consideration, in the usual course of business, without notice of the defect or infirmity in the title. 16 Barb. 560; 4 Esp. 56; 3 Comstock, 236; 4 Ib. 147; 1 Hill, 287; 10 Eng. C. L. 143, 154; 12 Ib. 121, 95, 142; 14 Ib. 330; 19 Ib. 201; 27 Ib. 234, 276; 31 Ib. 212; 37 Ib. 235; 41 Ib. 645; 42 Ib. 634; 10 Vermont, 141.

XIII. He must have acquired the title in good faith.

1. It was first held he must acquire the title without collusion or *mala fides*. 1 Bur. 452; 4 Dur. & Est. 30; 4 Ib. 315; 1 Ld. Ray. 738; 3 Bur. 1355, 1524; 2 Doug. 634, 640; 4 Esp. 56.

*2. It was next held, if he acquired title under such cir- [643] cumstances as would excite the suspicion of a prudent or careful man without due caution, although he gave value for it, he could not hold it. 3 Barn. & Cress. 466; 4 Ib. 330; 2 Car. & Payne, 215; Ib. 261; 6 Bing. 677; 16 Barb. 550; 3 Car. & Payne, 325; 2 Ib. 11; Ib. 314; 10 Eng. C. L. 154, 347; 12 Ib. 95, 121; 19 Ib. 201; 14 Ib. 330; 12 Ib. 5, 142.

3. It was next held, if he acquire title through gross negligence, he could not hold it; otherwise he could. 5 Barn. & Cress. 909, 1098; 16 Barb. 550; 27 Eng. C. L. 234, 276.

4. Finally, it was held that gross negligence might be evidence of *mala fides*, but it was not the same thing, and if he acquired title without *mala fides*, or collusion with the fraud, etc., he could hold the same. 4 Adol. & Ellis, 870, or 31 Eng. C. L. 212; 10 Adol. & Ellis, 784, or 37 Eng. C. L. 252; 1 Adol. & Ellis N. S. 489, or 41 Eng. C. L. 645; 16 Bark. 550; Story on Bills, secs. 194, 416; Story on Notes, sec. 197.

XIV. He must acquire the title not only in good faith, but upon

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a full and fair consideration paid. 16 Barb. 550; 12 Ib. 410; 5 Johns. Ch. 54; 16 Mass. 428; 1 Burr. 452; 4 Esp. 56; 31 Eng. C. L. 212; 37 Ib. 232; 20 Pick. 545.

XV. The title must also be acquired in the due course of business. 16 Barb. 552; 20 Peck, 545; 5 Johns. Ch. 54; 10 Bing. 243; 25 Eng. C. L. 116; 20 Johns. 651.

XVI. The title must also be acquired without notice of any defect or infirmity of title in him who transfers it. This principle is elementary. 16 Barb. 553.

XVII. The negligence, though gross, of the holder of a bank-check in its acquisition, confers no immunity upon the payer when 644] *presented for payment. 25 Eng. C. L. 116; 10 Bing. 243.

XVIII. The usages of business alone between the parties control their transactions, and not the usages of third parties, or the usages of either with others. 4 Esp. 56; 7 Cush. 423.

XIX. A general or special custom, to be obligatory, must be ancient, uniform, certain, reasonable, consistent, compulsory, and peaceably acquiesced in. But it does not control a written contract, nor vary a general rule of law. Wright, 572; 1 Ohio, 252; 19 Ib. 343; 16 Ib. 426, 515; 7 Cush. 417; 2 Sumner, 377; 1 Pet. 33; 15 Howard, 545; 13 Penn. 33; 1 Selden, 159.

RANNEY, J. We can not consider it necessary to enter at much length upon an examination of the power of the courts of this state to order a peremptory nonsuit. If any question can be said to be settled, this must be so regarded. There is reason to believe that the power has been constantly exercised since the first organization of the state government; and it is certain that, since 1813, the power has been expressly and repeatedly recognized by the legislature. From that time to this, by numerous statutory provisions, the party against whom such a judgment has been given has been secured in the right to appeal, or to except to the order of the court, and to review it on error.

In the multitude of cases that have in this manner found their way to the Supreme Court, no doubt has been expressed, either from the bench or at the bar, of the existence of the power, although the propriety of its exercise, in particular cases, has often been obstinately contested. It is true that these enactments have not, in terms conferred the power; but they furnish unmistakable evidence that the legislature was well advised of the course of decision upon

the subject, and intended it to continue with the proper safeguards, against abuse. In view of this *uninterrupted practice of [645 courts, sanctioned and regulated by the legislative department for half a century, it can matter but little what may have been the course of decision in other states, or in the federal courts. If there is anything eminently and exclusively our own, it is our system of legal procedure; and while an enlightened policy would require us to consult other systems when constructing one for ourselves, they ought never to be received to prevent the application of rules and principles which we have deliberately adopted and applied for such a length of time as to give them general notoriety. If it was necessary, however, it would not be difficult to show that our decisions have rather limited than extended the power exercised by the courts of such of the old states as were, for obvious reasons, most influential in giving character to our system of law and legal procedure. And if we have somewhat enlarged the practice of ordering involuntary nonsuits, as compared with the English courts and those of other states of the Union, it has been done, as a matter of practical convenience, by substituting this mode of proceeding for the demurrer to evidence, in full operation with them, thereby referring the rights of the parties to the same principles of adjudication and attaining the same end, but in a manner much less embarrassed with technical formality, and in its effect much more favorable to the plaintiff, against whom the power is exercised.

There is still less difficulty in defending the exercise of this power from the imputation of being an encroachment upon the constitutional right of trial by jury. The law of every case, in whatever form presented, belongs to the court; and it is not only the right of the judge, but his solemn duty, to decide and apply it. He must determine the legal requisites to the right of action, and the admissibility of the evidence offered to sustain it. When all the evidence offered by the plaintiff has been given, and a motion for a nonsuit is interposed, a *question of law* is presented, whether the evidence before the jury *tends* to prove all the facts involved in the right of action and put in issue by the pleadings. *In deciding this [646 question, no finding of facts by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree *tends* to prove, must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduces to establish, must be taken as fully established.

The motion involves not only an admission of the truth of the evidence, but the existence of all the facts which the evidence conduces to prove. It thus concedes to the plaintiff everything that the jury could possibly find in his favor, and leaves nothing but the question whether, as a matter of law, each fact indispensable to the right of action has been supported by some evidence? If it has, no matter how slight it may have been, the motion must be denied; because it is the right of the party to have the weight and sufficiency of his evidence passed upon by the jury—a right of which he can not be deprived, and involving an exercise of power for which, without his consent, the court is incompetent. But where he has given *no* evidence to establish a fact, without which the law does not permit a recovery, he has nothing to submit to the jury; and the determination of the court, that the fact constitutes an essential element in the right of action, necessarily ends the case.

It follows, from the views we have expressed, that we do not concur in the position assumed in argument, and supported by several New York cases, that a nonsuit may be ordered where the clear weight of the testimony is against the plaintiff. It is said, with much plausibility, that if the weight of the evidence is so decided, as that the court would grant a new trial if the verdict should be for the plaintiff, he can not be injured by taking the case from the jury in the first instance, instead of waiting to set aside their finding, after they have improperly given him a verdict. But, aside from the fact that such a practice involves an assumption of power by the court which the constitution and laws have committed to 647] the jury, in the very case supposed, the *plaintiff would have good cause to complain of injury. A nonsuit puts him out of court, and charges him with the costs; a new trial leaves him in court, and, ordinarily, exacts the costs from the other side. It would also have deprived the plaintiff of the benefit of section 98 of the practice act of 1831, limiting the power of the court, in granting new trials, to not more than two to the same party.

In fact, the two proceedings have nothing in common. The one reviews the evidence, but not until the functions of the jury have been discharged, and then only for the purpose of determining whether the cause should be submitted to another jury. The other takes the evidence from the jury, prevents a verdict, and disposes of the case. This can only be done when, assuming everything that the party has attempted to prove as true, and thereby obvi-

ating the necessity for a jury to find it so, the *law* still disposes of the case against the plaintiff, because some fact, material to his right of action, is unsupported by any evidence. So long as there is evidence *tending* to prove the whole issue, there can be no substitution of the court, for the jury, to pass upon it; and the party can not be deprived of the right to demand a verdict, without a substantial denial of the right of a jury trial. 22 Pick. 7; 17 Mass. 249; 14 Penn. St. 275.

Our conclusions upon this subject can not be better stated than in the clear and explicit language of one of the learned judges in the court below: "Wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a nonsuit can not be properly ordered: it is in no case a question as to the weight, but as to the relevancy of the testimony. If the testimony tends to prove a *prima facie* case for the plaintiff, a nonsuit can not be properly ordered. Nor can facts tending to prove a defense on the part of the defendant, though proceeding from witnesses introduced by the plaintiff, be considered on a motion to nonsuit. If the defendant wishes to set up any such facts, he must resort to the jury to have them established."

*2. Having settled the principles by which our inquiries [648 are to be guided, we are now prepared to ask the question: Were the plaintiffs properly nonsuited in the present case? An answer to this question demands a careful attention to the evidence contained in the bill of exceptions, and a settling of the state of facts that it conduced to prove, and then the legal principles applicable to such a state of facts.

There has been, and can be, no dispute that the money, for which this action was brought, was paid by the plaintiffs, and received by the defendants, on a check for \$7,500, purporting to be drawn upon the plaintiffs by Evans & Swift, a firm at Cincinnati engaged in the pork-packing business, and payable to Samuel Taylor & Co., or bearer; and that the check was a forgery, of which the parties were mutually ignorant at the time the payment was made. This check, with another for \$7,300, purporting to be drawn by S. Davis & Co., on the Mechanics and Traders' Bank, and which was also a forgery, was presented in the early part of the day it bears date, by a stranger having the dress and appearance of a drover, and expressing a desire to exchange them for

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Kentucky money or gold, to the teller of the defendant's bank, by whom they were taken and the gold advanced, at a discount of one-fourth of one per cent. He testified that he "did not know the standing of either firm, nor their signatures, but took the checks to Mr. Bishop, the cashier, laid them on his desk, and asked him if he should make the exchange. He [Bishop] said yes. Can not say whether he examined or knew the signatures. The checks were before him some three or four minutes. He assisted in calculating the premiums. *No question was asked as to who the presenter was, or as to his right to the checks.* He was probably in the bank from two to fifteen minutes; should not have recognized him again. He carried off the gold in saddle-bags. Both the banks, upon which the checks were drawn, were within less than a square; there was nothing to create suspicion, and nothing unusual in the transaction."

649] *In accordance with a custom of doing business between these banks, and, to some extent, with other banks of the city, this check, with others drawn upon the plaintiffs and taken by the defendant, were pinned together, with a ticket upon the top showing the amount of each and the aggregate amount of all, and on the same day presented to the plaintiffs, who paid the amount appearing from the ticket, without any examination of the checks; it being the custom, however, to examine them on the same day, and return such as were found not to be good. This check was examined, on the same day, by the note-clerk of the plaintiffs, and charged up against the supposed drawers. The forgery was not discovered until ten days afterward, when the check was returned to the defendants, and repayment demanded.

For the purpose of showing what was claimed to be gross negligence on the part of the defendants, the plaintiffs introduced several witnesses engaged in the business of banking at Cincinnati, who expressed the opinion that the defendants, in the exercise of proper diligence, should have required the person presenting the check to have drawn the money himself; or should, by inquiry, have been satisfied of his right to it, and of his identity. As expressed by one of them: "*It is the general custom in this city, when a check is presented for sale—that is, when it is presented by a stranger to a bank, not the one upon which it is drawn—to make inquiries in reference to his right to the check, and the identity of the person.*" And with a view of making it appear that this negligence

operated directly to their prejudice, and *induced the payment of the check*, the plaintiffs further gave evidence tending to prove their uniform custom of making such inquiries, when a check of this character, drawn upon them, was presented by a stranger; and that there was "not generally so strict a scrutiny when checks come from other banks, *it being presumed that caution had been already exercised.*" The tendency of this evidence can not be mistaken. It clearly conduced to prove the existence of a general custom *among the banks of Cincinnati, requiring the bank [650 taking a check of this character, drawn upon another, from a stranger, to be satisfied, by inquiry, of his right to the check, and of the person from whom it was received; and as clearly allowing the bank, upon which it was drawn, to rely upon the presumption that such caution had been exercised, when the check was presented for payment. If this custom, in both its branches, was established to the satisfaction of the jury, the fair presumption arising would be that the defendants had been negligent in failing to comply with an established custom of the business, necessary not only to their own security, but also to that of the bank upon which the check was drawn, and that the plaintiffs, not being informed to the contrary, paid the check upon the supposition that the custom had been observed; while it would be made absolutely certain that the intervention of the defendants had prevented the plaintiffs from exercising this precaution; and nearly so, that if it had been exercised by the defendants, the check would not have been purchased by them, or paid by the plaintiffs.

We do not say that the evidence was sufficient to establish this state of facts, or that it was not. It is enough that it had that tendency. It is wholly immaterial, for present purposes, how weak and inconclusive it may have been, or even that it was contradicted by other evidence given by the plaintiffs. As was well said in the court below, "if the testimony be contradictory, it can not all be admitted to be true; if not all true, judgment must be exercised in separating the true from the false; and this is the peculiar province of the jury."

Assuming all to be satisfactorily proved that this evidence conduced to prove, does the law permit a recovery? Upon this question we have bestowed the careful attention which the importance of the subject, as well as the learning and ability with which it was treated in the Superior Court, and by counsel in this court,

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seemed to demand, and a majority of the court are brought to the conclusion that it does.

651] *There is, certainly, no room for the application of technical or arbitrary rules, in determining the rights of the parties. Neither the form of the action nor the nature of the subject permits it. The action is brought for money had and received; and it lies in all cases, where one has the money of another, which he can not in equity and good conscience retain. It lies, therefore, for money paid by mistake, or upon a consideration which has failed; because, in such case, the plaintiff did not intend to give his money to the defendant, and the latter can not conscientiously retain money for which he has given no equivalent. This is the general rule; but it has its exceptions, as well settled and resting upon reasons as solid and satisfactory as the rule itself. Wherever the mistake has arisen from the fault or negligence of the party paying the money, and can not be corrected without prejudice to the party who has received it, there can be no recovery, and simply because the plaintiff is alone in fault; the defendant is under no obligation to submit to loss, to extricate him from difficulty, and may therefore conscientiously retain the money. The question is, does this case fall within the general rule, or the exception? We make the solution of this question depend wholly upon the answer to be given to another: Does the negligence imputed to the defendants, subject them to an action for the recovery of the money paid upon the check? Can a party, upon whom an established course of business devolves the obligation of making certain inquiries, before taking a check purporting to be drawn upon another, in negligent disregard of that duty, *conscientiously* retain the money received upon a forged instrument, when it appears that such negligence contributed to induce the payment?

Whatever of doubt might have been once entertained, it has been long settled that a person giving a security in payment, or procuring it to be discounted, vouches for its genuineness; and if it proves to be a forgery, he is still liable for the debt, in the one case, or for a return of the money in the other. 2 Johns. 455; 6 Mass. 182; 5 Taunt. 488.

652] *We admit it to be equally well settled, that, where the instrument is drawn upon, or purports to be signed by, the party paying the money, to a holder without fault, and whose situation would be thereby changed to his prejudice if he was compelled to refund,

the money can not be recovered back. The foundations of the rule are sufficiently obvious. The party is supposed to know his own handwriting, in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him *negligence*, and, as between him and the innocent holder, compels him to suffer the loss. For still stronger reasons, the drawee of a bill or check, who has accepted it, and again suffered it to go into circulation, is absolutely estopped to deny the genuineness of the drawer's handwriting. The acceptance necessarily involves the most positive affirmation that the instrument is what it purports to be, and the acceptor is not permitted to withdraw the assertion, to the prejudice of those who have, in consequence of it, given credit to the paper.

In all such cases, either of acceptance or payment, the foundation upon which the drawee is made to suffer the loss, is the imputed negligence in accepting or paying, until he has ascertained the bill to be genuine; and, in case of payment, notwithstanding he has done it in mistake, and parts with his money without receiving the supposed equivalent, and notwithstanding the holder has obtained the money without consideration, the former can not be relieved from the consequences of his negligence, at the expense of the latter, and the latter may in equity and good conscience retain what he has got. But this stern rule is only exerted in favor of a holder without fault, and for a valuable consideration; and we deem it equally clear that he may, by his own negligent conduct, place himself in such an equitable position in reference to the drawee, as to deprive himself of the benefit of this rule, and make it unjust and [653] inequitable that he should keep what he has obtained by mistake, and for which he has given no equivalent.

We do not here speak of negligence as a matter at large. We only intend to deal with the case before us; and that only requires us to say, that where the negligence reaches beyond the holder, and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he can not, in negligent disregard of this duty, retain the money received upon a forged instrument. But these propositions, we think, will be found fully sustained, if

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not in every particular, by direct adjudications, by the fixed principles upon which nearly all the cases have proceeded.

The leading case is that of *Price v. Neal*, 3 Burr. 1355. It is not very clearly reported, and has been the subject of some misunderstanding in the subsequent cases. The action was brought to recover the money paid upon two forged bills of exchange, drawn upon the plaintiff; one of which was first accepted and afterward paid, and the other paid upon presentation. Lord Mansfield lays some stress upon this circumstance; and he is very careful to say that the "misfortune happened without the defendant's fault or neglect," and that whatever of negligence there was, was on the side of the plaintiff.

Without advancing any views of our own, as the true ground upon which the plaintiff was denied a recovery, it will be sufficient to present those of the Supreme Courts of Massachusetts and New York. In *Young v. Adams*, 6 Mass. 187, Sewall, J., says, the strong ground for the decision, "although not so prominently stated by the reporter, was because the plaintiff's acceptance and payment of these false bills, considering them as drawn upon himself, *was his own peculiar negligence* by which the loss had been incurred; 654] and therefore it was not to be thrown back *upon the innocent holder of the bills." And Chief Justice Kent, in *Markle v. Hatfield*, 2 Johns. 462, says: "That decision turned upon the negligence imputable to the one party, *and not to the other.*"

In *Smith v. Mercer*, 6 Taunt. 80, the payment was made by the bankers of the party, who purported to have accepted the bill payable at their banking-house, and the forgery was not discovered for a week afterward. The court were of the opinion that no distinction was to be taken between a payment by the bankers of the acceptor and the acceptor himself, and gave judgment for the defendant. But the judges were not unanimous: Chambre, J., expressing his dissatisfaction with the reasoning in *Price v. Neal*, thought the case came within the general rule of money paid by mistake, and could be recovered back; while Gibbs, C. J., being the only judge, as Mr. Chitty thinks, who put the case upon the true ground, rested his judgment wholly upon the delay in giving notice, by which the defendant's remedy against the indorsers was lost. See Chitty on Bills, ch. 9, p. 463 (8 ed.)

In *Wilkinson v. Johnson*, 3 B. & C. 435, the bill was paid for the honor of an indorser whose name was forged; but the forgery was

discovered on the same day, and notice being given, the money was recovered back. Lord Tenterden, after examining the previous cases, and stating that a call upon the acceptor for payment was altogether a matter of course, while a call upon a person to pay for the honor of an indorser was unusual, and necessarily imports that the name of the correspondent, for whose honor the payment is asked, is actually on the bill, proceeds to say: "The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may be *reasonably lessened* by the assertion that the call makes upon him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the *person who thus calls upon [655 him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet, *where there is any fault in the other party, and that other party can not be said to be wholly innocent*, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties—that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches." And he adds: "We think the payment, in this case, was a payment by mistake to a person not wholly free from blame, and who ought not, therefore, to retain the money."

Now, as it is undeniably clear that a payment *supra protest*, either for the honor of a drawer or indorser, places the party paying in the same situation as payment by the drawee (the party for whom payment is made being supposed to be his correspondent, with whose handwriting he is acquainted), it is evident that this decision was grounded upon the negligence of the holder, in not properly informing himself as to the genuineness of the signature, before presenting the bill to the correspondent of the indorser for payment; and the case is very strong to show with what scrupulous fidelity every duty devolved upon the holder must be discharged, to entitle him to retain the money received upon a forgery.

I shall refer to but one other English case—*Cocks v. Masterman*, 9 B. & C. 902. In that case, as in *Smith v. Mercer*, the payment was made by the bankers of a supposed acceptor, and the forgery was discovered and notice given the next day. As there were indorsers upon the paper, the court held the notice too late. While

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it is admitted that the holder had notice in time to have charged the other parties upon the bill, it is nevertheless said, that he had the right, if he saw fit, to take steps against them on the day it matured, and that he ought not to be deprived of this right by the negligence of the party making payment.

656] *Among the American cases, those of the Gloucester Bank v. The Salem Bank, 17 Mass. 33, and Bank of the United States v. The Bank of Georgia, 10 Wheat. 333, were payments made upon forged notes, purporting to have been issued by the banks making payment. In the one case, a delay of fifteen days, and in the other of nineteen, had occurred in giving notice of the forgery to the banks receiving the money; and in each they were held entitled to retain it.

There can be no doubt of the correctness of these decisions. In neither case was the party receiving the money implicated in any fault; and while the decisions are based upon the analogy furnished by the rule, which fixes the rights of the drawee or acceptor of a bill, it is very successfully shown that, in reason, the rule has a much stronger application to the redemption of bank-notes, growing out of the fact that they purport to be the party's own paper, circulating as money, and therefore difficult to trace back, and from the greater facilities that a bank has to detect forgeries, by the use of registers and private marks.

In the first of these cases, Ch. J. Parker commences his able opinion by laying down the general principle applicable to that and like cases. He says: "In all such cases, the just and sound principle of decision has been, that if the loss can be traced to the *fault or negligence of either party*, it shall be fixed upon him. Generally, where no fault or negligence is imputable, the loss has been suffered to remain where the course of business has placed it." And he very reasonably concludes, that "it would seem to be a principle of natural justice, that where a loss has happened, he, through whose means it happened, should sustain it, although innocent, rather than he who is not only innocent, *but wholly without imputation of negligence.*"

In Levy v. The Bank of the United States, 4 Dall. 234, and Bank of St. Albans v. Farmers and Mechanics' Bank, 10 Vt. 141, the payment was made upon a check, purporting to be drawn by a 657] depositor upon the plaintiffs. In the first case, *the forgery was detected and notice given on the same day, and in the other,

not until after the expiration of two months; and in both, the right to retain the money was sustained. While the first case is certainly questionable, the last may have been correctly decided.

The *Canal Bank v. The Bank of Albany*, 1 Hill, 287, was the case of a forged indorsement of the payee, and the money paid by the drawees was recovered back; although the forgery was not discovered for two months after the payment, and the remedy against other indorsers was lost.

We do not cite this case as bearing directly upon the question under discussion, as it is well settled that payment by the drawee does not involve an admission of the genuineness of the signature of any indorser; and the rule has even been carried so far, as to be applied to the case of a bill payable to the order of the drawer, and purporting to be indorsed by him. Story on Bills, sec. 412. But the case is valuable for the general rule elicited by the court, upon a full review of all the cases we have cited, that "money paid by one party to another through a mutual mistake of facts, *in respect to which both were equally bound to inquire*, may be recovered back;" and that when money is thus paid upon a forgery, it is sufficient to give notice, without unreasonable delay, after the forgery is discovered.

In the case of the *Bank of Commerce v. The Union Bank*, 3 Comst. 230, the forgery consisted in increasing the amount by altering the body of the bill; and the drawees recovered back the money, although a notice was given too late to enable the holder to charge the indorsers. Judge Ruggles, in delivering the opinion of the court, after stating that the rule which casts the loss upon the drawee, when the drawer's name is forged, "is founded on the supposed *negligence* of the drawee in failing, by an examination of the signature, when the bill is presented, to detect the forgery and refuse payment," and that the rule did not apply to an alteration in the body of the bill, which was not *presumed to be in a [658 handwriting known to him, arrives at the conclusion, that "the greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery," and that, "if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require."

In *Goddard v. The Merchants' Bank*, 4 Comst. 147, the signature of the drawer was forged, and the bill was paid the day after it was protested by the plaintiff, for the honor of the drawer. The bill

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purported to have been drawn by a bank in Ohio, upon the American Exchange Bank in New York, and was indorsed by the person who forged it to the Bank of Rutland, Vermont, by which it was transmitted to the defendants for collection. In consequence of the absence of the notary, in whose hands it was placed, from his office, the plaintiff did not see the bill at the time he made the payment, but left word to have it sent to his place of business. On seeing it the next day, he pronounced it a forgery and demanded back the money. The court held him entitled to recover. They admit that he occupied the same position as the drawee would; but as he paid the bill without an opportunity of judging whether it was signed by his correspondents or not, and upon the representation of the holders that they had such a bill, that he could not be held to have admitted the genuineness of the signature. And although the forgery was discovered too late to give notice of protest, they held that no such notice was necessary, as the defendants had the bill only for collection and needed no recourse, and the payee who forged it was liable to the owners without notice.

We have thus particularly referred to every important case, in England and the United States, having a direct reference to the subject under examination, and to the grounds upon which these decisions have been made. It is readily admitted that no one of them is, in all respects, like the present. The governing principles by which these cases were ruled, rather than precise identity [659] *of circumstances, must furnish a guide for us. Several questions will readily suggest themselves, which we do not consider necessarily involved in the decision of this case. Amongst these is the question, whether, in cases properly within the rule, of payment by the drawee of a bill or other party occupying a like position, the payment becomes absolute as soon as made; or whether a discovery of the forgery, and notice given in time to charge the real parties upon it, will entitle him to a return of the money?

The cases cited from the Massachusetts and Wheaton's Reports pretty strongly imply that, in the case of bank-notes, the payment is absolute; and Mr. Justice Story, in his Treatise on Bills, is evidently of the opinion that the same rule is applicable to the payment of bills and checks. For myself, I must be permitted to say that I can see very little foundation in principle for this opinion. The ground upon which the drawee is denied the right to correct the mistake originating in his own negligence, is the preju-

dice arising to the holder from making payment instead of suffering the paper to be protested. I do not say that this prejudice must be affirmatively proved; the law may, in many cases, presume it. But where the only prejudice which the party could sustain would be the loss of remedies against other parties, and when the law by its own fixed rules determines that those remedies remain unimpaired, I think no such presumption can arise. And such is not only the opinion of Mr. Chitty, but he thinks it the fair result of the modern English cases. After alluding to the grounds of the contrary opinion, he says: "But, on the other hand, it may be observed, that the holder who obtained payment, can not be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument, even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the *loss had already attached upon himself, and why he should [660 be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties precisely the same as if the payment had not been made; and consequently the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that, of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the money shall be recoverable back." To this may be added the repeatedly expressed opinion of the courts of New York.

We pass without any remark, or the expression of any opinion, the claim of the plaintiffs, that, as the defendants were confessedly liable, under the custom, to return the money for one day, as there were no parties upon the paper to be made liable by notice of non-payment, and as the money was irrecoverably gone before the check was presented, unless recovered from the forger, whose liability still continues, the failure to give notice until the forgery was discovered, did not, in presumption of law, prejudice the defendants, and that it could only operate against the plaintiffs when it was shown that actual loss ensued; and, for the purposes of the case, we yield to the defendants the position, that, after the expiration of that day, and after the plaintiffs had the opportunity

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to examine the signature, they stood upon the same ground as though they had paid on sight of the check. We do not examine these propositions, because we think the case now depends upon much more obvious considerations.

Recurring again to the fact, that the plaintiffs gave evidence tending to establish a course of business, which required the defendants to take the first precautionary step for the detection of the forgery, which they wholly omitted to do, we proceed to apply the principles deducible from the cases referred to, to that attitude of the controversy. Viewed in that light, the case is most clearly within the principle upon which *Wilkinson v. Johnson* was decided. In that case, in consequence of the relation *of the parties, it became the duty of the holder to exercise active diligence to ascertain the genuineness of the bill. In this case, a like obligation arose from the course of business between the parties. In this case, as in that, the attention of the plaintiffs might be "reasonably lessened," under the supposition that this obligation had been regarded. And while it is true, here as there, that the plaintiffs ought to have satisfied themselves of the genuineness of the check before making payment, yet the fault "was not wholly and entirely their own, but began, at least," with the defendants; and the payment was made, not only "to a person not wholly free from blame," but to one grievously in fault.

Quite as clearly is it within the rule of Chief Justice Parker, requiring the loss to fall upon the party to whose "fault or negligence" it can be traced, and that of the Supreme Court of New York, affirming the general proposition that where the parties are equally innocent, or equally in fault, and money is paid upon a mutual mistake of facts, "in respect to which both were equally bound to inquire," it may be recovered back. In this case, there is every reason to believe, that if the defendants had required the person presenting the check to show who he was, he would have declined the ordeal, and it would not have been bought or paid. The loss may therefore be traced directly to their negligence. But whether this would have prevented the fraud or not, it is enough that both parties were bound to inquire, and, allowing both to be in fault, the result is precisely the same. The case of *Goddard v. The Merchants' Bank* is full to the purpose, that, in order to bring the drawee within the exception to the rule, which allows money paid under a mistake of facts to be recovered back, the whole responsi-

bility of investigating must be cast upon him by the holder, and, as between them, he must be left in possession of every effective means for prosecuting the inquiry. If the holder does not see fit to require this, or takes any part of the duty upon himself, or deprives the drawee of any part of these *means of information, the case, [662 in the language of Chief Justice Bronson, "is out of the exception, and within the general rule." And in all cases within the general rule, all the New York cases affirm it is sufficient to give notice when the forgery is discovered.

To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground, by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence can not now be corrected without placing the holder in a worse position than though payment had been refused. If the holder can not say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and can not with a good conscience retain it. To allow him to do so, would be to permit him to take advantage of his own wrong, and to pervert a rule, designed for his protection against the negligence of the drawee, into one for doing injustice to him.

Nor is it anything remarkable or unusual that such an obligation should arise from a settled course of business between the parties, or be established by the proof of a custom; or that the holder, should, for his negligent failure to regard it, be deprived of rights which he would otherwise be entitled to demand. No court has been more reluctant than this to allow local customs to interfere with the general principles of law; but to a certain extent, and within certain limits, it becomes absolutely necessary to enforce them, or to disregard the implied conditions and understandings upon which parties have dealt. To allow them to operate against third persons, who can not be shown to have had any knowledge of their existence, is one thing; and to hold the immediate parties to the controversy bound by a course of business upon which they have uniformly acted, or one embarked in *a particular business, at a place where it has [663 been found necessary to its safe or convenient prosecution, that a

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general custom should be observed, under obligations to conform to it, is quite another. Every one engaged in a business, undertakes to bring to it a competent knowledge of its rules and principles; and those who deal with him, have a right to rely upon his having regarded them.

The custom which the plaintiff sought to establish, seems to have been one of the most reasonable character. It is a great error to suppose that the drawee of a bill or check is bound to rely alone upon his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security, when dealing with strangers and in large amounts, against the ingenuity with which forgeries are now committed. The next most effective precaution is that of requiring the holder to furnish some reliable information of himself, and of his right to the paper. But when another bank intervenes and takes the check, this can not be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution. While the bank taking the check, by its exercise, is consulting its own security, as well as that of the bank upon which it purports to be drawn, it gets a full remuneration for its care, in the reciprocity afforded in relation to checks drawn upon itself and taken in like manner.

When the defendants purchased this check, they knew full well that it deprived the plaintiffs of the ability to make this part of the investigation, and that it would be paid to them without any examination whatever; and if the custom really exists, they must have known equally well that, in afterward passing upon the genuineness of the paper, the plaintiffs would have a right to rely, as an important element in forming a conclusion, upon the supposition that the 664] defendants had made the investigation, and were *satisfied with the result. And, while it may be very true that they did not warrant the genuineness of the checks, in the package which they presented for payment, yet, in the event supposed, they did what was equivalent to affirming—that they had checks for the amount they asked, received from persons either known to them, or of whose identity and honesty they were satisfactorily informed.

But the short answer to all this made by counsel for the defendants, and adopted in the Superior Court, is that negligence alone, however gross, and however injurious to the plaintiffs, can not affect

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the defendants; that "unless they have been proved to be complicated with the *fraud* by which the plaintiffs have suffered, they can not be held to refund the amount that has been paid to them." And they very correctly say that there was no proof of any such fraud or complicity in the forgery. This position is grounded upon the authority of several recent English decisions in relation to the proof necessary to impeach the *title* of a holder of negotiable paper, in conflict with many earlier cases in that country.

Gill v. Cubitt, 3 B. & C. 466, was the case of an accepted bill, which had been stolen, and was afterward discounted by the plaintiff (a bill-broker), without knowing the name of the holder, though his features seemed familiar, and without asking any questions as to his right to the bill. C. J. Abbott left to the jury the question, "whether the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent and careful man?" And he put to them this very significant inquiry, what they would think of a sign like this: "*Bills discounted for persons whose features are familiar, and no questions asked.*" The defendant had a verdict, and the court refused to disturb it. This decision was followed in several subsequent cases, until at length, in Crook v. Jadis, 5 B. & Ad. 911, which was also the case of an accepted bill, fraudulently put in circulation, Lord Denman told the jury to find for the *plaintiff, "if they thought he had not been guilty of gross [665] *negligence* in taking the bill;" and his ruling was sustained by the whole court. This case, again, governed several others, until, in Goodman v. Harvey, 4 Ad. & Ell. 870, Lord Denman and his associates took another step, and held that "gross negligence only could not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing," And they add, "We have shaken off the last remnant of the contrary doctrine."

It is not a little remarkable, if these cases can properly have so commanding an influence upon the question before us, that they should not have been alluded to, either by the court or counsel, in any of the cases to which we have referred. They present an important question, and, when it shall properly arise, one which will deserve careful attention; but, in the decision of this case, we regard it alike immaterial, whether the rule of Lord Tenterden, or the first impression, or "sober second thought" of Lord Denman, is adopted. They were all actions brought upon genuine bills, either stolen, lost, or fraudulently negotiated; and the rule which

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governed them all, has its foundation in that public policy which fosters the circulation of bills, as a medium of exchange, answering the purposes of currency. But the law has shown no such anxiety to facilitate the circulation of forgeries. On the contrary, however innocent and careful the holder may have been, if he is obliged to trace his title through a forgery, the instrument is a nullity in his hands. Before any encomiums can properly be passed upon the peculiar and happy adaptation of the bill of exchange for circulation, or any foundation can be laid for insisting that the title of the holder shall not be affected by anything that may have attended its private history before reaching his hands, a bill must exist, of which *title* may be predicated, and to which such considerations may be referred. We do not say that every name appearing upon it must be genuine; but there must at least, either at its inception, 666] *or coming upon it afterward and impliedly warranting the previous signatures, be some one liable to pay it before it acquires the character of a bill, in any respect or for any purpose. The rule insisted upon, is a rule alone applicable to the protection of *legal titles*, and to the instruments by which such titles may be acquired, and to no other. What title did the defendants get when they took the paper appearing in this case? Certainly none. It was as perfect a nullity as though no word had been written upon it. No one appeared to be liable upon it but the drawers, and their names were forged. Even the felon, although liable for his fraud, was not liable as a party to the paper. With exactly the same propriety could a plea of purchase, for a valuable consideration without notice, be sustained upon a forged deed, as this rule applied to a paper of that description.

If the defendants are entitled to retain the money, it is upon a different principle, resting upon different considerations, and with other and different objects. Confessing the nullity of the paper as a muniment of title, they must stand upon their interest, to know it at the earliest moment, and their right to exact the information from the plaintiffs, when it was presented for payment. The negligent omission of the plaintiffs to discharge this duty, resulting in injury to the defendants, lies at the very foundation of the rule, which subjects them to the loss and allows the defendants to retain the money. But it would indeed be singular, if the one party could be visited with consequences so severe, upon the mere legal imputation of negligence and injury, and the other stand wholly unaf-

fectured for their negligence, however gross and injurious it might have been. As was said in the *Bank of Commerce v. The Union Bank*, "the plaintiffs' right of recovery rests on equitable grounds;" and, in our opinion, they place themselves upon the highest equitable ground for a return of the money, when they show it was theirs, that they parted with it by mistake and without consideration, upon a forged instrument which the defendants, by their negligent disregard of duty, *had contributed to induce them to act upon as [667 genuine. In the forum of conscience, it is true, there may be a wide difference between intentional injuries and those arising from negligence. But no man operates quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life, rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception.

The necessity for care and caution on the part of those who use bills and checks, to prevent injury to those upon whom they are drawn, is strikingly illustrated in another class of cases, which turned upon a principle very analogous to the one that we have applied to this. As a general proposition, it is perfectly well settled that payment upon a forged check or order can not be charged by the party paying, against the party purporting to have drawn the paper; but the latter will be entitled to recover the money intrusted to the former, however innocently or with whatever caution the payment may have been made. *Hall v. Fuller*, 5 B. & C. 750; *Johnson v. Windle*, 3 Bing. N. C. 225; *Roberts v. Tucker*, 12 Q. B. 560.

But yet, in *Young v. Grote*, 4 Bing. 253, where the customer had intrusted his wife to fill up checks in his absence, and this had been so inartificially and carelessly done, as to be easily changed from £50 to £350, the banker was held entitled to a credit for the larger sum. In the very recent case of *Orr v. The Union Bank of Scotland*, in the House of Lords (29 Eng. Law & Eq. 1), Lord Chancellor Cranworth, in speaking of the general rule, and of the exception ingrafted upon it by this case, says: "The decision went on the ground that it was the fault of the customer; the bank had been deceived. The *principle is a sound one, that when the cus- [668-

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tomers neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine."

We have thus, at much greater length than was intended at the outset, stated our views of this case. We have nowhere doubted the wisdom or policy of the rule, which allows an innocent holder to require the drawee to pass upon the signature of the drawer, and makes him responsible for the decision he makes; nor the justice of permitting the former to retain the money received upon a forgery, when some one must suffer by the mistake. But we must be better informed than at present, before we shall be able to perceive the justice or propriety of permitting a holder to profit by a mistake which his own negligent disregard of duty has contributed to induce the drawee to commit.

Should the plaintiffs be ultimately able to satisfy a jury of the state of facts which their evidence before conducted to prove, they would, in our opinion, have established a clear right to recover.

Judgment reversed and cause remanded.

THURMAN, C. J., and SWAN, J., dissented.

REUBEN PERKINS v. MARGARET A. MOBLEY.

The mother of a bastard child, after the reputed father has been recognized by a justice of the peace, on a complaint instituted by her, under the act for the maintenance and support of illegitimate children, has no power to settle for or release his liability.

The liability of the father is created by the statute, and designed for the security of the public against the support of the child, by compelling him to make the necessary provision therefor; and can only be settled by the mother, while the complaint is pending before the justice, and upon giving 669] *security to the township in which she resides against all liability for such support.

It is not competent to inquire of the general reputation of a witness sought to be impeached; but the inquiry must be confined to the reputation of the witness for truth and veracity.

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PETITION in error; reserved in the district court of Belmont county.

The object of the petition is to reverse a judgment of the court of common pleas of the same county. The original proceedings were under the bastardy act. The defendant was recognized by the justice to the court of common pleas; and after he had filed his plea of not guilty, and the case was continued for trial, in consideration of the payment of one hundred dollars, a paper, of which the following is a copy, was executed:

"State of Ohio, Belmont county, }
 "Court of Common Pleas. }

"MARGARET MOBLEY v. REUBEN PERKINS.

"Suit pending under the bastardy act. The above case is settled; and I hereby authorize the same to be dismissed at my cost, and that I will not appear and further prosecute the same. This 19th day of September, 1853.

(Signed,)

"MARGARET MOBLEY."

It was refused to dismiss the case, in pursuance of this settlement, and a trial insisted upon. The defendant, therefore, filed a plea of *pais darrein continuance*, setting up the above settlement and payment of one hundred dollars, in bar of the further prosecution of the case; to which plea the defendant in error demurred, and the court of common pleas sustained the demurrer, for the cause that the complainant, under the bastardy act, could not compromise or release the cause of action. This is assigned as the first cause of error.

The cause was then tried by a jury; and during the progress of the trial, the plaintiff was examined as a witness, and, as in all such cases, was the principal witness. Samuel A. Talbot was called, on the part of the defendant, to impeach the character of the plaintiff. He testified that he lived in the plaintiff's neighborhood, and had known her for several years. The defendant, by his attorney, then asked him the following question: "Are you acquainted with the general reputation of the plaintiff among her neighbors; and if so, what is that reputation?" The counsel for the plaintiff objected to this question, on the ground that it went to general reputation; and the court sustained the objection, and refused the answer to be given. To which ruling of the court the defendant excepted, and which is assigned as the second cause

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of error. The jury returned a verdict of guilty; and a motion was made for a new trial, and overruled.

The defendant filed his petition in error in the district court, assigning for error the causes aforesaid.

Miller Pennington, for plaintiff in error, made the following points:

I. The statute clearly makes it competent for the complainant to settle the case, so far as she has any claim. It seems to give a double remedy: 1. Compensation for the injury; 2. Indemnity to the township against the maintenance of the child. The plaintiff's settlement, or neglect to bring a suit, or prosecute a suit to final judgment, does not, of course, prevent the trustees of the township from commencing or prosecuting a suit. She is liable for costs in case of defeat, and receives the benefit of the judgment in her own right in the event of success. Would it be doubted that, after judgment, she would have the right to release the defendant from its payment, in whole or in part? Would not her receipt to him, in satisfaction of the judgment, be binding?

II. It is said that the object of the statute is to protect the township against the support of bastard children. If this be so, the power is vested in the trustees, and no act of the complainant can interfere with it. All that is claimed is, that the plaintiff [671] *herself, after settlement, should not have been allowed to take any further steps in the prosecution of the case.

III. The defendant may, from motives of policy, although entirely innocent, prefer to settle with the complainant on the best terms he can. It is said the law abhors litigation and favors compromises.

IV. The court erred in refusing to admit the testimony of Talbot. 1 Greenl. Ev., sec. 461; *Bucklin v. State*, 20 Ohio, 24, 44; *Wike v. Lightner*, 11 S. & R. 198; *Rex v. Bisphan*, 4 C. & P. 392; *Hume v. Scott*, 3 Marsh. 260; 3 Phil. 786, Cow. & Hill's Notes; 1 Hall (N. Y.) C. P. 558. The old rule has always been perplexing, and the form of questions under it has given rise to great confusion in the mind of almost every witness to whom they were propounded.

That which affects the credibility of the witness is material to the issue. Will it be said that the jury would place the same estimate upon the testimony of a witness whose general reputation was bad on account of gross immorality, as they would in a witness

who was unassailable? If they would not, then the testimony is relevant and should be admitted.

C. C. Carroll, for defendant, made the following points:

I. At common law, no one was bound for the support of a bastard. The object of the statute is not to give damages to the mother or to punish the father, but to enforce the moral duty of the father to support the child. Natural justice requires him to do it. 13 Ohio, 245; Wright, 565; 1 Black. Com. 458; 2 Kent's Com. 222.

II. The whole purpose of the bastardy statutes is to furnish maintenance for the child and indemnity for the public against liability for its support. Our own decisions fully support this position. 9 Ohio, 149; 13 Ib. 244; Wright, 464, 564.

III. The money to be paid is not a debt due to the mother, but only a charge for maintenance. Same authorities.

*IV. It is not, therefore, within the power of the mother [672] to discharge the obligation.

V. It would defeat the leading object of the statute and deprive the public of all security if she had such power.

VI. The question of evidence was properly ruled. 2 Ohio, 18; 5 Ib. 226; 6 Black. 56; 8 Leigh, 542; 7 Black. 84; 1 Greenl. Ev., sec. 461; 13 Johns. 504; Cow. & Hill's Notes, 767.

RANNEY, J. A reversal of this judgment is urged upon two grounds: 1. The refusal of the court below to give effect to the accord and satisfaction, interposed by way of plea *puis darrein continuance*; and 2. In refusing to admit evidence of the general bad character of the prosecuting witness.

1. A moment's attention to the object and purposes of the proceeding, authorized by the act for the maintenance and support of illegitimate children, will show that no error was committed in sustaining the demurrer to the plea *puis darrein*. This plea alleged a settlement with the mother of the bastard child, while the cause was pending in the court of common pleas, and the payment to her of the sum agreed to be received in satisfaction. If the suit could be said to be prosecuted for her benefit, and if the remedy was designed to afford her redress, it would seem clear that she could settle the controversy, and effectually bar herself by receiving such satisfaction as she had agreed to accept. But nothing could be further from the purpose of the statute. The law gives

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her no remedy against her guilty paramour. It regards them as equally in fault, and is only solicitous to provide for the support of the innocent offspring of their guilt. Without the statute, the father could not be reached; his liability is created by the statute, rests upon the moral obligation he is under to support his child, and the whole object of the proceeding is answered when the paternity of the child is judicially ascertained, and this moral duty 673] is enforced in such manner as *to secure the public against the liability of providing for the support of the child. This great leading purpose of the law must be kept constantly in view; and no power in the mother over the proceeding, inconsistent with the right of the child to this support from the father and consequent indemnity to the public, can be recognized to exist.

In many of the states, begetting a bastard child is made an offense, and punished by indictment; but in this state it is not so. The proceeding here is not strictly civil or criminal. It neither punishes a crime, nor gives redress for a civil injury. It is simply a statutory remedy to enforce a high moral duty; and the moral duty is enforced to prevent a burden, which ought to rest upon the father, from falling upon the public. It may be instituted on the complaint of the mother, or if she neglects it, or fails to prosecute to effect, by the proper public authorities. At one point in the proceeding a settlement may be made. If, when the accused is brought before the justice, he pays or secures to be paid to the complainant, such sum of money or property as she may agree to receive in full satisfaction, and shall further give bond that the child shall not become a township charge upon any township in this state, the justice is authorized to discharge him from custody on his paying the costs. But to prevent all imposition, the agreement must be made or acknowledged by both parties, in the presence of the justice, who is required to make a memorandum thereof upon his docket. No power whatever is given to the complainant to impair the public security in this settlement. It can not be made until the accused has given security that the public shall not be burdened with the support of the child. If such security is not given, he must be bound over; and when recognized, no further power is given to settle or compromise the controversy. If found guilty, he shall be adjudged the reputed father of the child, and shall stand charged with the maintenance thereof, in such sum or sums as the court shall order and direct, with payment of costs of prosecution; for

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which he *must give security, or go into custody. It will be [674 observed that no authority is given to take indemnity by bond to secure the public against the support of the child, after the prosecution leaves the justice. The only indemnity afforded after that time is the sums awarded to be paid, and the stringent modes provided for their enforcement. To allow the complainant to intervene and prevent the recovery, would be to surrender all protection for the public, and to defeat the leading object of the whole statute. We are therefore of opinion, that she has no such interest in the money, required to be awarded against the reputed father, as to enable her to release his liability before a recovery, or to discharge him from the sum awarded, after the order is made; that the statute definitely appropriates the money to the support of the child, and that it can not be diverted from that purpose. It is ordinarily, and very properly, ordered to be paid over to the mother, as she continues burdened with the custody and support of the child; but even this is within the sound discretion of the court, which should be exercised with a view to the best interests of the child, and the consequent protection of the public from being made chargeable with its support.

This construction of the statute is not only strongly supported, but we think necessarily follows, from the decisions made by the Supreme Court, in the cases of *State v. Mitchell*, Wright, 464, and *Hawes v. Cooksey*, 13 Ohio, 242.

2. The question of evidence, made by the second assignment, has, since the reservation of this case, been decided by us in accordance with the ruling of the court below. We are still satisfied with that decision, and it is now unnecessary to repeat the reasons upon which it was founded.

Judgment affirmed.

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Gregory v. C., C. & C. R. R. Co.

675] *HIRAM GREGORY v. CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD COMPANY.

Where two of the judges of the court of common pleas are interested in the event of a proceeding to appropriate land to the use of a railroad, and that fact appears in the record, and there is no evidence that the landholder waived his objection to the court, the order of such court, appointing appraisers and directing a warrant, will be reversed.

CERTIORARI to the district court of Union county.
The case is stated in the opinion of the court.

Sweetzer & Reid, for plaintiff.
S. Finch, for defendant.

KENNON, J. The Cleveland, Columbus and Cincinnati Railroad Company, in 1849, sought to appropriate a part of the plaintiff's land for the use of the road. The instrument of writing appropriating the land, was filed in the clerk's office of the court of common pleas of Delaware county, a copy served on Gregory, and a petition filed asking **M. L. Griffin**, one of the associate judges of the court, to appoint three disinterested freeholders, resident of the county, appraisers, to ascertain the amount of damage which Gregory ought to receive according to the statute then in force.

The associate judge appointed the appraisers, who made the appraisal, found the damages and benefits equal, and made their return accordingly. Application was afterward made to the court to set aside the appraisal and proceedings, for reasons assigned in the motion. The proceedings were set aside, and the court of common pleas appointed three other commissioners, and by **warrant** under the seal of the court, required them *to make the proper appraisal. In August, 1849, these commissioners made their return, assessing the defendant's damage at \$205, and the benefits conferred on the defendant by the road at the sum of \$145, making the difference between the damages and benefits \$60, to be paid by the company. A motion was made by Gregory to set aside this report for several reasons; one of which was, that two of the judges of the court of common pleas, which appointed the appraisers or commissioners, were stockholders in the railroad com-

pany. The court refused to set aside the report, but made a journal entry that two of their members were, at the time of making the appointment of the appraisers, and still were, stockholders in the company, and interested in the matter in controversy, and, under the statute, certified the case to the court of common pleas of Union county. A motion was made in the court of common pleas of Union county to set aside the report, for the same and additional reasons; but the court overruled the motion, and confirmed the report of the commissioners. The case was then taken by Gregory, on *certiorari*, to the district court of Union county. The district court reversed the order of the court of common pleas of Union county, and remanded the case to the court of common pleas of Union county for further proceedings. The case is brought into this court on *certiorari* to the district court by the railroad company, for the purpose of reversing the order of the district court.

The error assigned by the company is, that the district court erred in reversing the order of the court of common pleas of Union county confirming the report of commissioners.

If the court of common pleas of Union county erred in confirming the report of the commissioners and the action of the court of common pleas of Delaware county, then there is no error in the order of the district court.

Is there any error in the ruling of the court of common pleas of Union county?

*It is claimed that the court of common pleas of Union [677 county ought to have set aside the report of the commissioners and the whole proceedings, for various causes, which we do not consider it necessary to state, particularly as we find one cause for which, we think, the order of the common pleas should be set aside, and therefore the judgment of the district court affirmed.

It appears from the record, that two of the judges of the court of common pleas of Delaware county were stockholders in the railroad company, at the time of the commencement of the proceedings, and still were, at the time the case was transferred to Union county court. They were interested parties in the whole proceedings; and the question presented is, whether they could make an order, touching the merits of the case, which could not be reversed, when no error appeared in the order itself? Is the mere fact that they were interested, a sufficient ground upon which to reverse the judgment? The district court so held. Did that court err in so

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holding? No man should be judge in his own cause, is a very common and true saying. If an interested court had nothing to decide but pure questions of law, and if those questions could all be clearly saved, so as to be presented to a higher court, there might not be so much objection to such judges sitting in their own cases, because, if they erred, there might be a remedy to correct their errors. It sometimes, however, happens that there is great difficulty in getting correct bills of exceptions taken before disinterested judges, and there might be much greater before interested judges. In this proceeding, however, the court have the power, not only to decide the law questions arising in this case, but the statute confers on the court, and upon the court only, the power of selecting the men who shall decide the facts in the case, who determine how much benefit the road will be to the landholder, and how much damages he will sustain by the appropriation of the land—questions upon which men are likely to differ very much, some supposing that a railroad would be of great advantage 678] to the person through whose *land the road passes, and others that it would be an intolerable nuisance; the amount, if any, which the landholder receives depending entirely upon the preconceived opinions of men as to the utility of such road, and, consequently, the increased or diminished value of the land through which the road passes. There are few subjects upon which men are more likely to differ in opinion, and few cases in which an interested judge, in the mere selection of the commissioners, could (if he chose to do so) more effectually injure the landholder, and that, too, without redress, if his judgment could not be reversed without showing actual error in the proceedings.

In the case of *George A. Pearson v. John Atwood*, found in 13 Mass. 324, the interest of judges is discussed by Chief Justice Parker. The plaintiff brought an action of trespass against the defendant, for arresting the plaintiff, on a warrant held by the defendant as constable.

It appeared that a justice of the peace had issued a warrant to the defendant to arrest the plaintiff for a violation of the Sabbath day; that, by the laws of Massachusetts, a moiety of the fine went to the town in which the justice resided, and that, therefore, he was interested. And, although the court did not find it necessary, in the case, to hold the act of the justice wholly void, yet the chief justice, in commenting on the law, says: "It is very certain that, by the

principles of natural justice and of the common law, no man can lawfully sit as judge in a case in which he may have a pecuniary interest. Nor does it make any difference how small the interest is. Any interest, however small, has been held sufficient to render a judge incompetent. The only exception known to this broad and general rule, exists where there may be a necessity that the judge should act in order to prevent a failure of justice." After reciting the opinion of Lord Mansfield, in the case of *Hestrupe v. Braddock*, upon the subject of the interest of witnesses and juries, Chief Justice Parsons says: "It is true he does not comprehend a judge within *his general exclusion on account of interest, but [679 there can be no doubt that the principle applies, with equal strength, to them; and we think, for this cause, *any judgment* rendered by a justice thus circumstanced, might be defeated; but as the interest of a justice who issues a warrant, may be latent and unknown to the officer who is called upon to serve it, we are not prepared to say *he* may not be protected from damages."

No authority is cited by counsel bearing directly upon this point, and few can be found; and for the reason, that in but few cases do interested judges ever pretend to sit in such cases.

We think, for the administration of justice, the safe way is, in all cases, for interested judges to decline acting in such cases; and where it appears, on the record, that they were interested, and acted on questions of fact, and especially when they were to select the jury who try the facts, they should refuse to sit, and make known their interest at the earliest stage of the proceedings, that the case may, under our statute, be transferred to an adjoining county. In this case, the court appointed the appraisers and received their report, and did not, on motion, set the same aside; nor did the court of common pleas of Union county. We think the whole proceedings, after the issuing of the warrant, are erroneous, and ought to have been set aside; that the court of common pleas of Delaware county ought to have retraced its steps, and set aside the report of the commissioners, and that the court of common pleas of Union county erred in not doing so, and that, for this cause, the district court was right in reversing the order of that court.

The judgment of the district court is therefore affirmed, with costs.

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*TIMMONS v. DUNN.

In an action brought for the purchase price of personal property, it is competent for the defendant, upon giving notice of his intention to do so, to *recoup* against the plaintiff's claim any damages he may have sustained by fraud in the sale or breach of warranty.

Such a proceeding is in the nature of a cross-action, and governed by the same principles.

When the controversy is between the original parties to the contract, it makes no difference that a note or bond was given for the purchase price.

If the defendant elects to present his claim in this form, a decision for or against him is a bar to another action.

ERROR to the common pleas of Ross county, reserved in the district court.

The original action was one before Isaac Fleming, a justice of the peace, founded upon breach of warranty in the sale of a horse. The defendant in error was plaintiff, and the justice gave judgment for defendant, whereupon defendant in error appealed and filed his declaration in the common pleas in assumpsit. Plaintiff in error plead the general issue and filed notice that he would offer evidence of the prior adjudication of the matter in issue, before William Mick, a justice of the peace, as a bar. The court rejected the testimony, which tended to prove that, upon the trial of the action before Mick, which was to recover upon a note given for part of the purchase money of the horse, defendant in error had set up a claim to *recoup* the damages, by reason of the alleged breach of warranty. Mick decided against the claim of defendant in error to *recoup*, being of opinion that there had been no breach of warranty, and rendered judgment for plaintiff in error. Upon the trial in the common pleas of the appeal from Fleming's decision, the court rejected the testimony as to the former trial and the ad-
681] judications of Mick, and the *plaintiff in error excepted. This writ was issued to the common pleas and made returnable to the district court, where the case was reserved for decision here.

Milton L. Clark, for plaintiff in error, cited :

1 Greenl. on Ev., secs. 529-531; 20 Ohio, 344; *Basten v Butler*, 7 East, 479, 481; *Lewis v. Cosgrave*, 2 Taunt. 2; *Farns-*
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worth *v.* Ganard, 1 Camp. 38; Fisher *v.* Samuda et al., 1 Ib. 190; Poulton *v.* Lattimore, 17 E. C. L. 373; Street *v.* Blay, 22 Ib. 122; 2 Starkie on Ev., 645, 646; Lowe *v.* Tucker, 19 E. C. L. 225; Jones *v.* Scriver, 8 Johns. 453; Beeker & Beeker *v.* Vrooman, 13 Ib. 230; Burton *v.* Stewart, 2 Wend. 236; McAllister *v.* Reab, 4 Ib. 484; S. C., 8 Ib. 109; Spalding *v.* Vandercook, 2 Ib. 431; Gleason & Viole *v.* Clark's Adm'r, 9 Cow. 57; Blanchard *v.* Ely, 21 Wend. 342; Cook *v.* Mosely, Ib. 277; Still *v.* Hall, 29 Ib. 51; Ives *v.* Van Epps, 22 Ib. 155; Westlake *v.* Degraw, 25 Ib. 669; Batterman *v.* Pierce, 3 Hill, 171; The Mayor of Albany *v.* Trowbridge, 5 Ib. 71; Barber *v.* Rose, Ib. 76; Whitbeck *v.* Skinner, 7 Ib. 53; Judd *v.* Denison, 10 Wend. 512; Van Epps *v.* Harrison, 5 Hill, 63; Tone *v.* Brace, 8 Page, 597; Britton *v.* Turner, 6 N. H. 481; Miller *v.* Smith, 1 Mason, 437; 1 Pet. C. C. 221; Dodge *v.* Tilerton, 12 Pick. 328; Harrington *v.* Stratton, 23 Ib. 510; Hunt *v.* The Otis Company, 4 Met. 464; Christy *v.* Reynolds, 16 Serg. & Rawle, 258; Todd *v.* Gallagher, Ib. 261; Steigleman *v.* Jeffries, 1 Ib. 477; 2 Kent's Com. 474; Culver *v.* Blake, 6 B. Mon.; Moore *v.* Nestbit, 3 Hill's S. C.; Swan's Treat. (ed. 1841) 440, ed. 1854, 602; Hare & Wallace's Note to Cutler *v.* Powell, 2 Smith's L. C. 45 (ed. 1852); Hatchett & Brother *v.* Gibson, 13 Ala.; Sedgwick on Damages, 456; McAlpin *v.* Lee, 12 Conn. 129; Harlan *v.* Reed, 3 Ohio, 285; 2 East, 446; House *v.* Ford, 4 Black. 293; Williams *v.* Harris, 2 How. Miss. 627; Supmt. U. S. D., secs. 297, 312.

**Alfred Yapple*, for defendant, cited:

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1 Greenl. Ev., sec. 524; Starkie Ev. 214, 215; Comyn on Cont. 37, 38; 3 Wend. 236; 13 Johns. 56; 16 Ohio, 504; 4 Viner's Abr. 533; McAllister *v.* Reab, 8 Wend. 109; Harlan *v.* Reed, 3 Ohio, 285; State *v.* Collins, 6 Ib. 126; Poulton *v.* Lattimore, 17 E. C. L. 373; 9 B. & C. 259; 4 Man. & Ry. 208; Baston *v.* King, cited 7 East, 480; Street *v.* Blay, 22 E. C. L. 122; 2 B. & Ad. 464; DeLewhanberg *v.* Buchanan, 24 E. C. L. 352; Fisher *v.* Samuda, 1 Camp. 190; Cormack *v.* Gillis, cited 7 East, 480; Tye *v.* Gwynne, 2 Camp. 346; Morgan *v.* Richardson, 1 Ib. 40; Obbard *v.* Betham, M. & M. 483; Archer *v.* Bamford, 3 Stark. 175; Spiller *v.* Westlake, 2 B. & Ad. 155; Day *v.* Nix, 9 Moore, 159; Solomon *v.* Turner, 1 Stark. 51; Jones *v.* Bright, 5 Bing. 33; Chitty on Contracts, 464; Reab *v.* McAllister, 8 Wend. 109; Frisbee *v.* Hoffnagle, 11 Johns. 50; Beeker *v.* Vrooman, 13 Ib. 302; Spalding *v.* Vandercook, 2 Wend. 431;

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Burton v. Stewart, 3 Ib. 236; 3 Ohio, 285; State v. Collins, 6 Ib. 126; Kinnear v. Thomas, 4 West. Law Jour. 187; Pulsifer v. Hotchkins, 12 Conn. 234; Thornton v. Wynne, 12 Wheat. 183; Harlan v. Reed, 3 Ohio, 285 (Ham. Revised); State v. Collins, 6 Ohio, 144; 16 Ib. 504; Scudder v. Andrews, 2 McLean, 464; 3 Dev. 396; 2 A. R. Marshall, 545; Bain v. Wilson, 1 J. J. Wilson, 282; 7 Cranch, 565.

RANNEY, J. This case, involving questions of very considerable interest and importance when it was tried, has become comparatively unimportant by a decision of this court made since it was reserved, and by the adoption of the code of civil procedure. The case of the Steamboat Wellsville v. Geisse, 3 Ohio St. 333, has settled, for all cases pending when the code took effect, that the doctrine of *recoupment* is a part of the law of this state, and a form of remedy to be administered by its courts; while the code itself has confessedly provided for the same thing in the future, under the form of a (683] counter-claim. It may be readily *admitted that this doctrine, in its present completeness, had a very imperfect foothold in the early and technical period of the common law; nor is it at all surprising that it should have been adopted by degrees, and with much hesitation; or even that it should not now be universally recognized. But, if it has made its way to favor slowly, it has nevertheless done so surely; and there is no hazard now in affirming that, with very inconsiderable exceptions, it has become fully naturalized in the courts of England and the United States.

A moment's attention to the principles upon which it is founded, will sufficiently indicate its limits and proper application. It is no defense to the action, but only affects the amount to be recovered by the plaintiff. It consists simply in allowing the defendant, who upon his part has a right of action against the plaintiff, growing out of the same transaction, by giving notice of his intention to do so, to settle his rights in the same suit, and to deduct so much from the plaintiff's claim as he would be entitled to recover if he brought a cross-action. As stated by Bronson, J., in a late case: "It is a matter which is never pleaded in bar. It is in the nature of a cross-action. The right of the plaintiff to sue is admitted; but the defendant says he has been injured by the breach of another branch of the same contract on which the action is founded, and claims to stop, cut off, or keep back so much of the plaintiff's damages as will

satisfy the damages which have been sustained by the defendant." *Nichols v. Dusenbury*, 2 Comst. 286. It properly applies in actions brought for the purchase price of property, where the defendant claims fraud or warranty. In such case, if the plaintiff was permitted to recover the whole amount stipulated, the defendant might bring his action and recover back to the extent of his injury. No earthly reason can be given why such a controversy should be divided into two suits, instead of being settled in one. On the contrary, individual justice and public policy unite in requiring a definitive settlement at the earliest moment that the rights of the parties can be properly investigated. It involves no examination of separate transactions, and the court and jury employed to settle the rights of the plaintiff, are as competent as any other can be to settle those of the defendant. As the whole consists in deducting from the stipulated price of the property the amount for which the plaintiff is liable for his fraud or warranty, and as the great object is, in this manner, to avoid circuity of action and needless litigation, it is evident that it can make no possible difference how the contract is evidenced. Whenever the action is brought for the price of the property, and is between the original parties to the contract, it is the absolute right of the defendant to have the amount of his damages deducted from that price, instead of being put to a separate action; and when he elects to litigate his rights in this form, he is as fully barred by a decision for or against him, as though he had prosecuted an independent action for the recovery of his damages.

We see nothing in this case to take it out of the operation of these principles; and we are therefore of opinion, that Justice Mick was fully competent to have allowed Dunn all the damages to which he showed himself entitled, in the action prosecuted before him for the price of the horse; and that the court of common pleas erred in rejecting the evidence offered, to show that it was so litigated, and that the adjudication was a bar to the action afterward brought.

The judgment must be reversed, and the cause remanded.

Hueston v. E. & H. R. R. Co.

685] *THOMAS HUESTON v. THE EATON AND HAMILTON RAILROAD COMPANY.

The owner of land regularly appropriated to the use of a railroad company, upon proceedings instituted by the company, under laws providing therefor, is barred of the common-law remedy to sue for and recover the damages he may have sustained by the entry of the company and the construction of their road upon such land.

In such case, the bar is equally effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him and deposited for his use.

ERROR to the court of common pleas of Butler county.

The original action was brought to recover from the defendant, for the construction of its railroad upon the lands of the plaintiff, by which he claimed he was damaged \$4,000. The defendant pleaded to the declaration, and the third plea upon which the decision of the case turned was, in substance, as follows: "For a further plea the defendant comes and says, that the plaintiff ought not to maintain his action against it, because, by virtue of the power and authority conferred upon it by an act of the general assembly of the State of Ohio, enacted on the 7th day of March, 1851, entitled 'an act to amend and consolidate the several acts relating to the Eaton and Hamilton Company,' which said act was afterward, to wit, on the first day of April, A. D. 1851, at Eaton, in the county of Preble, and State of Ohio, to wit, at Butler county aforesaid, accepted by the board of directors of said Eaton and Hamilton Railroad Company, by a journal entry to that effect, regularly made upon the journal of the proceedings of said company. The said defendant did heretofore, on the 20th of April, 1851, enter upon the lands of the plaintiff, for the purpose of examining and surveying the line of the said railroad, and the said defendant then and there ascertained that it was necessary to appropriate, and did appropriate, 686] to the use of said *company, a strip of land 100 feet wide, through the plaintiff's land, for the distance of 3,402 feet, more or less, containing twelve and four-tenths acres, more or less, with the privilege of removing and using a sufficient quantity of earth and other material, except timber, within said limits, to make and construct said railroad; and to restore the crossing of the turnpike over the said railroad, the

same to be used as a way and bed for said railroad, of the width of one hundred feet, with grades, excavations, embankments, drains, and culverts; allowing the said plaintiff, his heirs and assigns, to pass and repass over the same in a reasonable manner, not interfering with the rights and interest of said company. And the said defendant further says, that upon the making of said appropriation, the defendant did forthwith, on the 10th day of July, 1851, file with the clerk of the court of common pleas of said county of Butler, a description of the rights and interest so appropriated, as such description remaining on file in the office of said clerk, will fully and at large appear. And said defendant further says, that the said railroad company did, upon making the appropriation aforesaid, to wit, on the 11th day of July, 1851, deliver to the said Thomas Hueston, a copy of the said act or instrument of appropriation, and that thereupon, the court of common pleas of Butler county not being then in session, Nehemiah Wade, Esq., one of the judges of said court, did, upon the application of the defendant (of which application the said Thomas Hueston had due notice), by his warrant duly issued, appoint Fergus Anderson, James W. Cochran, and Giles Richards, three disinterested freeholders of the said county of Butler, to appraise the damages which the said Thomas Hueston would sustain, by reason of the appropriation of the premises and rights aforesaid, of which appointment the said Hueston had due notice. And defendant further says, that by virtue and in pursuance of the command of the warrant aforesaid, afterward, on the 14th day of July, 1851, the said freeholders having been first duly sworn, at the time and place named in the warrant, *and having [687 fully heard the parties, did, on actual view and upon full consideration of the premises, appraise the value of the land of the said Thomas Hueston, so appropriated and taken for the use of said defendant's railroad, at the sum of nine hundred and thirty dollars, and the damage done, by reason of said railroad to the said tract of land, at three hundred and seventy-eight dollars—making, together, the sum of thirteen hundred and eight dollars; and the said freeholders appraised the benefits which would accrue to said tract of land, by the construction of the railroad, at three hundred dollars, and the difference being one thousand and eight dollars, the said freeholders assessed that sum as the damages of the said Thomas Hueston in the premises, and made return of the same, under their hands

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and seals, to the clerk of the court of common pleas of Butler county, by whom the same was duly filed and recorded.

"And defendant further says, that the said railroad company paid into the hands of the said clerk, to and for the use of the said Thomas Hueston, on the 18th of July, 1851, the sum of one thousand and eight dollars, as his damages aforesaid. And thereupon, by virtue of the provisions of the said act, it became and was lawful for the said defendant to hold the interest in the lands and materials aforesaid." The plea then alleges that, in the construction of the said railroad, the acts were rightfully done of which the plaintiff complains, and prays judgment if the said plaintiff ought to maintain his action. The plaintiff replied that the matter, in the introductory part of the plea, had been wrongfully done by the defendant without the consent or acquiescence of the plaintiff, and in defiance of the objection and protest of the said plaintiff, and, therefore, he ought not to be barred of his action in the premises. The court sustained the plea of the defendant, whereupon this writ of error was brought.

Vance, for Hueston.

———, for railroad company.

688] *BANNEY, J. The third special plea of the defendants sets up a regular appropriation of the lands of the plaintiff for the track of their road, and a deposit of the sum awarded him, with the clerk of the court, for his use. To this he replied that the assessment was made without his consent and against his protest, and that he then refused, and still refuses, to receive the sum awarded in satisfaction of the damages claimed in the declaration. The demurrer to this replication having been sustained, and judgment given for the defendant, his counsel now insists that the assessment provided by the statute for property taken for public uses, is cumulative merely to the common-law remedy by action, and unless acquiesced in by the owner, and the amount awarded received by him in satisfaction, is no bar to the common-law remedy, and, consequently, no bar to the present action.

We can not yield our assent to this position. Before a case for an election of remedies can arise, there must be a wrong requiring a remedy. A right of action must exist before the party can choose, as between two modes provided by law for obtaining satis-

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faction. In the case before us, as it is made to appear by the pleadings, no wrongful act has been done; no trespass upon the plaintiff's property has been committed, and, consequently, no right of action ever existed in his favor. The defendants have regularly appropriated his property to a public use, and before taking possession, or otherwise interfering with it, have paid him its full value in money, as provided by law. The public, as it lawfully might, has compelled him to submit to a forced sale of the property to be applied to a public use. But in all this, no legal wrong has been done; it was but the exercise of a lawful authority, and lawfully and regularly pursued. He has but submitted to one of the conditions upon which all property is holden—the sovereign right of the state to appropriate it to public uses when necessary, upon making compensation. His right to compensation was perfect and absolute; but when these proceedings were had, under the former constitution of the state, *no court or jury was required to [689 fix the amount. Any fair mode of assessment, provided by law, was sufficient. *Willyard v. Hamilton*, 7 Ohio, 115 (pt. 2); *Work v. The State*, 2 Ohio St. 307.

After the amount was regularly ascertained, and paid or deposited for the use of the owner, the title to the property, or such interest as was necessary for the use of the company, passed from him to the company, to be held in trust for the public, just as fully and effectually as though he had voluntarily conveyed by deed. In afterward entering upon it, they entered upon their own land, and not upon his; and used it as lawful proprietors, and not as trespassers.

If they had taken possession without making compensation, a very different question would be presented. Although that constitution did not provide that the compensation should be made before the property was taken, still it would seem to be doubtful whether the property could be appropriated until it was done, and whether the company might not be treated as wrong-doers, and, as such, subjected to a common-law action, at the election of the owner, instead of a proceeding, on his part, under the statute. But even upon that state of facts, the case of *Hickcox v. The City of Cleveland*, 8 Ohio, 543, supported by numerous decisions in other states, would seem to confine the owner to the statutory mode of assessment. Upon that question, however, we express no opinion. All we decide is, that where the corporation itself insti-

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tutes the proper proceeding, and regularly appropriates the property by making compensation, no right of action arises against it; and that such proceeding is equally effectual, whether the owner submits to it or not, or whether he takes or refuses the money deposited for his use.

The diversion of the water-course was a necessary consequence of making the embankment, and fell within the appropriation for which compensation was made, and seems to be fully justified by the plea.

Judgment affirmed.

690] *NICHOLAS LONGWORTH v. STURGES AND ANDERSON.

The district and Supreme Courts are capable of receiving jurisdiction to review cases decided by themselves.

Such jurisdiction, in chancery cases, is conferred on the district court by the law authorizing appeals, and on the Supreme Court by the law authorizing the reservation of a cause.

It is also conferred by the act of March 14, 1853. Sec. 6, 51 Ohio L. 474.

A bill of review is not an original bill or suit.

BILL of review.

The cause of *Sturges & Anderson v. Nicholas Longworth* was decided at the January term of this court, 1853, the decree of the court below in favor of the defendant being reversed. To review this decision the bill now before the court was filed; and this is a motion to dismiss the bill, on the ground that the court has no jurisdiction to entertain it.

H. H. Hunter, W. B. Caldwell, A. E. Gwynne, John W. Andrews, and E. P. Norton, for defendants.

V. Worthington (Worthington & Matthews), and H. Stanbery, for complainants.

H. H. Hunter, for defendant, made the following points in support of the motion:

The court is now called upon to entertain a bill of review, to supervise its own final decree in chancery, rendered in a cause regularly before the court for the exercise of its appellate jurisdiction.

tion. Is the jurisdiction which the court is now called upon to exercise, appellate or original?

Appellate jurisdiction is that sort of jurisdiction which is exercised by a superior court over the orders, judgments, and decrees *of an inferior court, on the removal of the record of the [691 inferior into the superior court. 2 Yerger, 499; 10 Ib. 200.

This idea of an appeal, from the decision of an inferior to a superior tribunal, is wholly wanting in the case in hand, of a petition to the court to review its own decree.

The evil to be remedied by the appeal from the inferior court, is the judgment or decree of that court. Under our present system, like that of the federal courts, the judgment or decree of the Supreme Court is remanded, for execution, to the court below; and when its power is exercised by the rendition of a final judgment or decree, and the cause is remanded to the court below for execution of such final judgment or decree, it has become *functus officio*; that power and jurisdiction which were called into action by the appeal, having been fully exercised, is exhausted; and if the final judgment or decree, which has been pronounced by the court of *dernier ressort*, shall ever again come to be reviewed (which could only be done in the same court), it evidently would be, in virtue of the exercise of some other jurisdiction than the *exhausted*, appellate jurisdiction, in virtue of which the judgment or decree to be reviewed was rendered. 7 Wheat. 58; 1 Hen. & Mun. 13; 2 Paige, 45; 3 How. S. C. 413.

The Supreme Court of Ohio is an appellate court of *dernier ressort*, with very limited original jurisdiction—in this respect being almost exactly like the Supreme Court of the United States. Cases have been brought before that court (U. S.) by appeal, in which for reasons wholly overlooked by attorneys and court, the federal courts had not any jurisdiction, but which passed into final judgment or decree in the Supreme Court. And these same cases, after being remanded to be further proceeded in by the court below, and for execution of the decree, have again been brought before the Supreme Court—the whole record—and the errors for want of jurisdiction pointed out, and the court invoked to vacate its former *final* adjudications. But this has been *refused as often as [692 asked, not because the court was not made sensible of the error, but for the want of power, and this, too, in cases regularly brought before the court, by appeal, after further and final orders in the lower

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court—the Supreme Court holding, in all such cases, that, having once exercised its power and jurisdiction in the case, and upon the record in which the alleged error existed, it had no power to review and reverse its own judgments and decrees. 3 How. U. S. 413.

The jurisdiction by which an appellate court of final resort would supervise its own decisions, is not *appellate* but *original*, and therefore this court, for constitutional reasons, has not the power to exercise such jurisdiction. If such jurisdiction can be holden to be *appellate*, it can only be exercised by the court, when authorized by law so to do; and as yet no law exists warranting its exercise.

The authorities principally relied upon, in support of the propositions contained in this argument, are the following, the points decided in each, applicable to the case, being here briefly stated:

“A rehearing not allowed in equity cause, after it has been remitted to the court below to carry into effect the decree.” Browder v. McArthur, 7 Wheat. 58.

“The Supreme Court has no power to review its decisions whether in a case at law or in equity. A final decree in chancery is conclusive as a judgment at law.” Washington Bridge Co. v. Stewart, 3 How. S. C. 413.

“A decree affirmed by the court of appeals, on bill of review, ought not to be reversed except for new matter.” McCall v. Graham, 1 Hen. & Mun. 13.

“A bill of review will not lie on a decree of the Supreme Court, in said court, to reverse its own decree, said court *having no original jurisdiction*.” Cox v. Breedlove, 2 Yerg. (Tenn.) 499; Wilson v. Wilson, 10 Ib. 200.

“Bill of review not allowed for newly discovered facts, to review 693] a decree affirmed in the court of errors, unless the right *is expressly reserved, in the final decree of the appellate court.” Stafford v. Bryan, 2 Paige, 45.

Same as last above. Blight v. McIlray, 4 Mon. 146.

Mitford Eq. Pl. by Jeremy, 88; Cooper's Eq. Pl. 91, 92.

A. E. Gwynne, for defendant, in support of the motion to dismiss, made the following points :

The Supreme Court of Ohio, under the constitution of 1851, can not entertain a bill of review, to a decree rendered by the same court, in a cause reserved to it, after the constitution of 1851 took effect.

"The original jurisdiction of the Supreme Court is limited, by the constitution, to writs of *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*; and as this case does not come under either of the heads of original jurisdiction, it must be entertained under the appellate jurisdiction or be dismissed." The Logan Branch, *ex parte*, 20 Ohio, 432; 2 Ohio St. 498.

The most imperative mandate by the legislature, that a bill of review may, or can, be filed in the Supreme Court, can avail naught, if that court has not the power, by the constitution, to hear and determine it; if it has not, in other words, jurisdiction over it. 6 Pet. 709; 2 How. U. S. 338. Notwithstanding, therefore, express provisions of law, courts, having appellate jurisdiction, have refused to act upon original applications; such as petitions to issue writs of *mandamus* or *habeas corpus*. 1 Cranch, 135, 175; 7 Eng. 103; 4 Florida, 165; 9 Porter, 383, 389. If jurisdiction be wanting, all proceedings of courts are void.

The proposition, that a court, with appellate jurisdiction, may entertain a bill of review, filed in that court, can only be maintained by showing that such a bill does not come within the purview of original jurisdiction.

In *Cox & Catron v. Breedlove et al.*, 2 Yerger, 499, it was decided that a bill of review will not lie upon a decree rendered *in [694] the Supreme Court of Tennessee. This is supported by *Overton v. Bigelow*, 10 Yerg. 48.

In *Mercer v. Stark*, 1 Sm. & Mar. Ch. 479, 485, the chancellor speaks of the high court of errors and appeals, in Mississippi. "That jurisdiction of a bill of review does not belong to a tribunal having mere appellate jurisdiction, is, I think, perfectly clear. Bills of review are classed, by Lord Redesdale, as bills in the nature of original bills. If this is their true character, if they partake of the nature of an original bill in chancery, it would seem difficult to sustain the jurisdiction of a court, that is declared to have no jurisdiction but such as belongs to a high court of errors and appeals."

See opinion of the Court of Appeals of Virginia, *Reid's Adm'r v. Striker's Adm'r*, 7 Grattan, 76, 80. Also, Maryland Court of Appeals, *Thomas v. Doub*, 1 Magruder, 325, 396; 7 Gill, 244, 333; *Pinckney v. Jay*, 12 Gill & J. 69, 93. Kentucky: 3 J. J. Marsh. 493, 610. *Storer v. Cannon*, 17 Vt. 219; *Marbury v. Madison*, 1 Cranch, 137; 1 Curtis' Commentaries, sec. 13.

The Supreme Court of the United States has no power to review

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its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Washington Bridge Co. v. Stewart*, 3 How. U. S. 413, 424; 6 Cranch, 267; 5 Ib. 314; 1 Wheat. 304, 355; 6 Ib. 113, 116; 7 Ib. 58; 10 Ib. 442; 12 Pet. 492.

V. *Worthington*, for complainants, made the following points on the appellate powers:

I. An appeal from the decree of the chancellor or vice-chancellor to the House of Lords, is, by petition to reverse or vary the decree, upon the grounds stated, and is analogous to a writ of error, or certiorari at law. 2 Smith Ch. Prac. 39-47, sec. 42; 2 Harrison Ch. Prac. 127, 128.

695] II. The decrees of the United States district courts are *reversible by the United States circuit courts, upon a writ of error. Gordon Dig. 99; Ingersol Dig. 92; sec. 22, judiciary act of September 26, 1789; appeal by section 21, judiciary act of September 26, 1789, in admiralty.

III. Decrees of United States circuit court are revisable in the United States Supreme Court, on writs of error, as at law. Sec. 22, judiciary act of September 24, 1789; Ingersol Dig. 92; Gordon Dig. 83.

IV. Decrees of the state courts are revisable in the United States Supreme Court, on writs of error, where is drawn in question the validity of a state statute, upon the ground of its repugnancy to the United States constitution, etc. Sec. 29, judiciary act of September 24, 1789; Ingersol Dig. 99; Gordon Dig. 81.

V. In admiralty cases the appeal suspends the sentence altogether, and it is not *res adjudicata* till the final sentence of the appellate court. Gordon Dig. 84; 5 Cranch, 280; 5 Wheat. 434; 10 Wheat. 502.

VI. In Kentucky an appeal, like a writ of error, does not vacate the decree appealed from, but is simply a proceeding to review the decree or action of the inferior court. It operates as a supersedeas, in the same way, and upon the same terms, that a writ of error operates, and not otherwise. 1 Ky. Dig. (1834) 127, 142.

VII. In New York an appeal from the final decree of the chancellor does not vacate or stay the proceedings on the decree of the chancellor, but takes up all his proceedings connected with the final decree. 1 Johns. Ch. 77, 189; 3 Ib. 66; 7 Ib. 295.

VIII. In New York an appeal from the decree of the chancellor to the court of errors is by petition precisely like the petition for an appeal to the House of Lords. It is to vacate, alter, etc., the chancellor's order. 1 Johns. Ch. 325, 560; 20 Johns. 501; 9 Ib. 442.

IX. 1. The judiciary act of 1803 gave the Supreme Court of *Ohio original jurisdiction in certain cases, and appellate jurisdiction from the common pleas in land cases, and other cases over \$100, and regulated appeals. 1 Chase Stat. 355, sec. 3; 357, sec. 9; 1 Ohio, 176.

2. This act is silent as to the effect of proceedings on an appeal.

X. 1. The chancery act of 1804 gives to the Supreme Court of Ohio original jurisdiction in certain cases, and appellate jurisdiction from common pleas, in cases over \$100, and land cases. It regulates and directs how appeals shall be taken. It allows also bills of review. 1 Chase Stat. 432, secs. 1, 2, 7.

2. The chancery act of 1807 recognizes the act of 1804, but is silent as to appeals. 1 Chase Stat. 565.

3. The chancery act of 1810 gives to the Supreme Court of Ohio original and appellate jurisdiction in certain cases (sec. 2), and gives appeals as in law cases (sec. 51). It allows reviews (sec. 63). 1 Chase Stat. 690.

4. The practice act of the same year, and taking effect at the same time, allows final decrees to be re-examined by writ of error in the Supreme Court. 1 Chase Stat. 707, sec. 13. It also allows appeals, and declares the effect thereof to be to render the judgment or decree appealed from void. 1 Chase Stat. 711, secs. 41, 42, 1 Ib. 707, sec. 13; 711, secs. 41, 42.

5. The practice act of 1816 is in these respects similar to the practice act of 1810; 2 Chase Stat. 970, secs. 95-98; 2 Ib. 971, secs. 99, 100.

6. The practice act of 1824 is similar to the prior acts (2 Chase Stat. 1275, secs. 95, 97-99), with this qualification: the lien remains, and the decree or judgment is suspended by the appeal. 2 Chase Stat. 1276, secs. 100-102.

7. The chancery act of 1824 allows appeals as in suits at law, also reviews. The practice act of that year allows writs of error on decrees. 2 Chase Stat. 1282, sec. 45; 2 Ib. 1286, sec. 66.

*8. The practice act of 1831 is like that of 1824 upon appeals, but does not allow writs of error upon decrees. 3 Chase Stat. 1690, secs. 108-112.

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9. The chancery act of 1831 allows appeals as at law, and liens preserved, etc. 3 Chase Stat. 1702, sec. 55.

XI. It is very apparent that the purpose and object of the remedy given by an appeal from the chancellor or vice-chancellor in England to the House of Lords, or from the United States circuit court to the United States Supreme Court, or from the chancellor to the court of errors in New York, or from the circuit court in chancery in Kentucky to the court of appeals, are, to re-examine the decree of the inferior court, for affirmance or reversal. The appellate court acts entirely as a court of errors at law. The decree below stands until reversed, and may be proceeded in, unless suspended by an order, bond, etc., for that purpose.

XII. In Ohio, upon her appellate system under the constitution of 1802, far different has been the practice. The appeal certainly, after the chancery act of 1810, vacated the decree appealed from, and simply transferred the case from one chancellor to another, to be considered and examined, *de novo*, as if no decree had ever been pronounced—even upon new pleadings and new proofs, if necessary. The case, though appealed, is still before the chancellor as an original case, and not as a case passed upon and for revision, where the decree appealed from is to be affirmed, modified, or reversed. So the law continued from 1810 until 1824. The law of 1824 retained the lien of the decree appealed from, but suspended it until the appellate court made its order upon the original case, as a court of chancery, and not as a court of errors. In Ohio, the whole effect of the appeal was to transfer the case from one chancellor to another, to be taken up, heard, considered, and decreed upon, precisely as if no transfer had ever been made, and no adjudication had been had.

XIII. It is quite evident, then, there is no analogy between these appellate systems; and while it is eminently true the one 698] *does not allow bills of review in the court of errors to re-examine its decrees, the other does; because its court is not a court of errors acting upon a decree, but a court of chancery acting upon the original case without or aside from any former decree. And as the known usages of chancery, as well as the statutes regulating our chancery practice, have always allowed reviews of all chancellors' decrees, no good reason can be given why the one chancellor's decrees should not be reviewed as well as the decrees of the other. In fact, all decrees of all chancellors come under the same usage

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and the same statute, and in Ohio the decrees of the Supreme Court can be examined on review precisely as the decrees of the court of common pleas. In this respect, the rule and the statute applicable to the decrees of the one court are equally applicable to the decrees of the other.

H. Stanbery, on the same side:

This was a case in chancery, *pending* in the Supreme Court for Hamilton county, on the 1st September, 1851, when the new constitution went into force.

The final decree in common pleas was rendered in the common pleas of Hamilton at the February term, 1851.

Having been transferred from the Supreme Court for Hamilton county to the district court for the same county, it was, by the district court, at the November term, 1852, reserved to the Supreme Court under the new constitution; and at the January term, 1853, the final decree—being a decree reversing the original decree—was rendered in that court.

The question now presented is, whether the remedy, by bill of review, may be resorted to in the Supreme Court by Mr. Longworth, the party against whom the decree of reversal was pronounced.

I think the question depends on the true construction of section 4 of the schedule of the constitution, and section 533 of the code.

*In the first place, it is clear that if a bill of review will [699] not lie in this court, it will not lie at all. The final decree was rendered *here*, not in the district court. Of course the remedy by bill of review must be in this court, and not in the district court. To deny that remedy to us here, is to deny it altogether. Now, it is undeniable that, as this suit was a suit in chancery, pending when the new constitution took effect, one of its incidents, or, to speak more correctly, one of its *remedies*, under the laws then existing, was the right of either party to file a bill of review upon the final decree of *any* court having jurisdiction in the case. The courts in which such final decree might have been had at that time, were the common pleas and the Supreme Court on the circuit, whether the decree were rendered on the circuit, or after reservation, in the court in bank.

The new constitution provides for a new organization of the courts—a new common pleas, a district court, and a Supreme Court; and it provides, as to cases pending in either of these courts, that

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they shall be transferred to the new courts; that is to say, from the old common pleas to the new common pleas—from the Supreme Court on the circuit to the district court, and from the Supreme Court in bank to the new Supreme Court.

This case, as has been stated, was, at the date of the new constitution, and at the date of the first act organizing the courts under it (February, 1852), pending in the Supreme Court on the circuit; and was, accordingly, under the 12th article of the schedule, transferred to the district court for Hamilton county, "*to be proceeded in*" (as is the language of this section) "*as though no change had been made in said Supreme Court.*"

It is very clear, that while the new constitution contemplates a new system of procedure, and provides for a new organization of courts, that it carefully excepts "*cases pending*" from its operation. They are not to be "*affected*" by it; but are simply transferred into the new courts, as successors of the old, to be *proceeded in*, without any *change*—a *change* merely of the *forum*, not of the *mode of procedure*.

700] *Next comes the code—the new law of remedies—the change from the old mode of procedure. It abolishes all suits in chancery—all bills, original and not original—and, among others, all bills of review. No court in Ohio has any longer jurisdiction of a suit in chancery, to be thereafter instituted, with the exception clearly provided for in section 533.

That section, in the plainest language, provides a saving of the remedy by bill of review. It provides this remedy as well for final decrees in chancery theretofore rendered, as for final decrees thereafter to be rendered in cases then pending. It provides or saves this remedy as to all final decrees, without any saving or qualification, or exception of any court, which has rendered, or which may render, such final decree. It provides that all chancery cases then pending, in whatever court, may be prosecuted to final decree—and after final decree, may be "*reviewed in the same manner*"—that is, by bill of review in the court where the final decree is rendered—"and within the same time as if this code had not taken effect"—that is, within five years.

Now, what sort of a case have we here? A case in chancery pending when the new constitution took effect, and therefore not to be affected by that new constitution—a proceeding in chancery pending when the code took effect, and to be proceeded in, and to

be reviewed in the same manner and within the same time, as if the code had never been passed! And yet it is argued that the constitution or code, or both together, have affected this pending suit in a most vital particular—have changed the mode of procedure, and have cut off one of the pre-existing remedies!

A very artificial and, I may add, unsound process of reasoning, leads the opposite counsel to this result.

They say that the present Supreme Court has no original jurisdiction, except in the four cases specified in the constitution—that a bill of review is the exercise of original jurisdiction. They say, further, that the present Supreme Court is a tribunal in the last resort, and therefore its decision is final, and not to be questioned on a bill of review, even if such a proceeding is in the nature of appellate jurisdiction.

In this reasoning, we lose sight of the case. We are not considering the jurisdiction of the Supreme Court as now fixed by law, and as a question at large. If we were, there would be a shorter answer to our bill of review; and that is, that it has no jurisdiction proper in any chancery case, either original or appellate, upon an original bill, a bill of review, or any other mode of proceeding in chancery. We are to consider its jurisdiction in an excepted class of cases.

There are now several chancery cases upon the docket of the present Supreme Court. They are here in consequence of the savings in the constitution and the code. They involve a sort of jurisdiction—a mode of procedure which no court in Ohio can exercise under its proper jurisdiction. They are the excepted cases, not merely to be decided, but to be proceeded in, and especially to be reviewed, in the old manner, and not according to the new manner. It is true these proceedings are to be had in the new courts, but the new courts, *pro hac vice*, must conform to the old proceedings and remedies, and are inevitably invested with all jurisdiction, call it what you will, appellate or original, necessary to that end.

In arranging these new courts, our case has been transferred, first into the district court, and then taken, without any decision in the district court, to the present Supreme Court, where a decree was rendered against us, at the January term, 1853. Every step in the proceedings to this final decree, has been according to the old forms. It was a case pending when the new constitution took effect, and a decree in chancery rendered, and the time not expired for a review,

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when the code took effect. The constitution says the new organization of the courts shall not affect the case, and the code says the decree may be reviewed.

It is not to be overlooked that these savings and provisions are in relation to the remedies, and therefore are to receive a liberal 702] *interpretation. But what sort of interpretation is claimed upon this motion? Directly in the face of these savings, we are told that the right to file a bill of review is taken away. The constitution saves the right, and the code not only saves it, but gives it expressly—and yet it is argued that it is taken away!

Suppose the case had not been reserved to this court, but that the final decree had been rendered in the district court, could we have been refused our bill of review then? The reasoning of the opposite counsel would have denied it to us; for that court has no more original jurisdiction than the Supreme Court; and so all the savings and provisions made to save our rights, would be frustrated. Are we in a worse condition because our case has been, on the motion of the other party, and by the act of the district court, transferred to this tribunal for decision? We answer in the negative. The right existing in us, the right saved to us, was to prosecute a bill of review upon any final decree, in any court.

The matter seems to me to be too plain for much argument; I shall not urge it further. At the same time, I do not admit that anything like original jurisdiction is involved in a bill of review, or that the cases cited from the Supreme Court of the United States have anything to do with the question now presented. It is one thing to consider how far this court will review, upon error or otherwise, its decisions upon cases that come before it, appropriately, under the new system—quite another thing it is, to consider what this court will do upon cases like one now in hand, over which it exercises a sort of vicarious jurisdiction, and which come to it as remains of an old system, and to be proceeded in, and settled, upon the old remedies.

KENNON, J. A bill of review was filed, in the court of common pleas of Hamilton county, to reverse a decree of that court. The cause was taken to the Supreme Court of that county, by appeal, 703] and was there pending when the new constitution took *effect; was regularly transferred to the district court, and by that court reserved for decision by the Supreme Court. At the January term,

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1853, the Supreme Court reversed the decree of the court of common pleas, and remanded the cause to that court for further proceedings.

The bill under consideration was filed in this court, to review and reverse its own decree.

Sturges and Anderson, who are defendants to this last bill of review, moved the court to dismiss the bill. The principal grounds for the motion are—

1. That, by the present constitution of Ohio, the Supreme Court has original jurisdiction only in *quo warranto*, *habeas corpus*, *mandamus*, and *procedendo*; that, in the consideration of this bill of review to its own decision, the Supreme Court would be exercising original, and not appellate, jurisdiction.

2. That, if it be the exercise of appellate jurisdiction, still the legislature, although authorized by the constitution to do so, has not as yet conferred that jurisdiction on the Supreme Court; and, therefore, whether it be the exercise of original or appellate jurisdiction, this court can not entertain jurisdiction, and the bill must be dismissed.

On the other side, it is claimed—

1. That, whether the entertaining of a bill of review be the exercise of an original or appellate jurisdiction by this court, it can rightfully entertain jurisdiction, for the reason that the original bill was pending when the new constitution took effect, and that, by a provision in the constitution and subsequent acts of the legislature, the right to correct an error of the Supreme Court, by bill of review, is saved to the parties to such pending suit.

2. That the Supreme Court, in entertaining a bill of review, would be exercising appellate and not original jurisdiction.

The motion has been argued on both sides by able counsel, and with great ability, and has received a very careful consideration from this court. This question is one not free from doubt.

*It is very clear, that the Supreme Court had jurisdiction [704 of the case in which it made the decree, to reverse which the present bill of review is filed. This indeed is not denied. It could not be with any show of reason.

It is equally clear, that however erroneous the decree may be, if this court can not review its own decree, no *other* court can, and the party is wholly without remedy. The truth of this proposition is admitted by the counsel who make this motion, but they claim

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that it is the necessary consequence of a decision of a court of the last resort, having no more *original* jurisdiction than is conferred on our Supreme Court.

Indeed, it is argued with much force, "that it would be far better for the parties litigant—all who are engaged as lawyers, parties, and judges, in preparing and disposing of business before it, to understand that its determinations are, in the full sense of the word, *final*, than that the court might be required to review its determinations; that the business would be better prepared for the action of the court, the court would deliberate more carefully, and that which is, in most cases, of equal importance would follow, viz., there would be an end of litigation."

That the legislature, under our constitution, could authorize an appeal, in all cases, from the decisions of the district courts to the Supreme Court, there can be no doubt. The Supreme Court, by the constitution, "shall have original jurisdiction in *quo warranto*, *habeas corpus*, *mandamus*, and *procedendo*, and such appellate jurisdiction as may be provided by law." The Supreme Court is capable of receiving appellate jurisdiction directly from any court in the state. The legislature might lawfully provide, that every case tried in the several courts of common pleas, whether the questions were of law or of fact, might be appealed to the Supreme Court of the state; that such appeal should vacate the the judgment below; and that the case, when so appealed, should be tried in the Supreme Court, in the same manner as in the common pleas; and that the Supreme Court should have the same power 705] *and control over the case, which the court of common pleas had before the appeal.

Such case could not originate in the Supreme Court; but, having originated in the court below, and having been properly brought to the Supreme Court, by appeal, the question might arise, what power could the legislature confer upon the Supreme Court over the case, and the parties in the Supreme Court? Is that court not capable of receiving power to try a case by a jury—to receive the verdict, render judgment, and enforce its own judgment by execution? Is it not capable of receiving power to grant a new trial, either on account of the verdict being against evidence, or on account of the court receiving incompetent or rejecting competent evidence, or on account of the misdirection of the court to the jury on points of law? The Supreme Court, as an appellate court,

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has jurisdiction of the cause; and it could scarcely be doubted but that all these powers might be conferred on such appellate court, as necessarily incident to the proper determination of the cause. The time within which such application to the Supreme or appellate court, for a new trial, could be made, might also be prescribed by the legislature. It might be required to be made at the same term at which the judgment was rendered, or the time might be extended until the first day of the next term of the court after the rendition of the judgment. We think such legislation would not be liable to the objection that it was unconstitutional because it conferred upon the court original jurisdiction. It would be appellate jurisdiction if the language of the constitution had been stronger than it is, and if it had provided that the Supreme Court should have original jurisdiction in *quo warranto*, *habeas corpus*, *mandamus*, and *procedendo*, and in no other case whatever. Still, we think the time for making application to that court for a new trial might constitutionally, by legislation, be extended to a term of the court subsequent to that in which the judgment was rendered. The granting of such new trial, and vacating the judgment, would not be the exercise of original jurisdiction. The superior court would *have acquired jurisdiction of the cause, [706 and of the parties, by appeal; and having rightfully acquired that jurisdiction, under the constitution, the question would be, what power is the court capable of receiving over the cause and the parties, as an appellate court; or, in other words, where the superior court has, by appeal from some inferior court, rightfully acquired jurisdiction of a cause, can the legislature, without a violation of the constitution of the state, confer on the court the power to correct its own decisions in such appellate cases, at a subsequent term of the court, and after it has rendered a judgment or decree, by writ of error *coram nobis*, or by a bill of review?

That a bill of review in such case would be an original proceeding, and that, in entertaining it, the court would be exercising an original jurisdiction, and powers which can not be conferred on the Supreme Court, is the claim of the parties making this motion. It is said that when the decree is once made, and the term of the court closed, both parties and the cause are beyond the power of the court; and after that term, jurisdiction could be acquired only by an *original proceeding*, and, on the part of the Supreme Court, would be the exercise of an original jurisdiction, which is not, and

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can not be, constitutionally conferred on that court. If this claim be true, it certainly puts an end to the controversy, and the bill must be dismissed for want of jurisdiction.

It is undoubtedly true, that no bill of review can be filed until after a final decree is rendered, and the parties, in effect, out of court. Can the parties be brought into court a second time, for the purpose of having that decree reversed, unless by an original proceeding? The complainants in the original bill may be the defendants in the bill of review, and, according to our practice, the defendants must be brought into court by a subpoena in chancery, if one can be served. It does not, however, follow that, because the bill prays a subpoena, and the court issues one, the court is necessarily exercising an original jurisdiction. If a cause is brought 707] into the Supreme Court by a writ of error to an inferior court, some process must be served on the defendant in error; and yet it could hardly be contended that the Supreme Court, in such case, was exercising an original jurisdiction, merely because the parties were, for the first time, brought before the Supreme Court by a process issued by that court; so that it can not be determined that the Supreme Court is in the exercise of original jurisdiction, merely because it brings the parties before it by original process.

Is a bill of review an original proceeding? Is it any more so than a writ of error, to reverse the judgment of an inferior court? The one is prosecuted to reverse a judgment of an inferior court, the other to reverse the decree of the same court; the rights of the parties have, in both cases, been determined by a competent tribunal, and the object of the proceedings, in both cases, is to reverse that determination. It might be difficult to find any treatise on chancery proceeding in which it is distinctly claimed that a bill of review is an original bill. Some authors treat it as a bill in the nature of an original bill; others as a secondary bill; and Cooper, in his Treatise on Equity Pleadings, says it is *not* an original bill. He divides bills into original and not original bills. He calls all those original bills which relate to some matter "not before litigated in the court by the same parties," and those *not* original "which relate to some matter already litigated in the court by the same parties, and which are either an addition to or continuance of an original suit." Cooper's Eq. Pleadings, 43. Among these bills not original, he names a bill of revivor, a supplemental bill, a bill of revivor and supplement, a cross-bill, a bill to carry a decree

in a former suit into execution, a bill to impeach a decree for fraud, and a bill of *review*. These several bills are said, by Cooper, not to be original bills; they all relate to matters already litigated by the parties. Story says: "The most general division of bills is into those which are original and those which are not original. Original bills are those which relate to some matter not before litigated in the court *by the same persons and standing in [708 the same interests. Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are either an addition to or a continuance of an original bill, or both. There is another class of bills which is of a mixed nature, and sometimes partakes of the character of both of the others. Thus, for example, bills brought for the purpose of cross-litigation, or of controverting, or suspending, or *reversing* some decree or order of the court, or of obtaining the benefit of a former decree, or carrying it into execution, are not considered as strictly a continuance of the former bill, but in the nature of original bills." Story's Equity Pleadings, sec. 16. Indeed, an application to the same court in which a decree was made to reverse its own decision is sometimes termed an *appeal*, and consequently may be said to be, on the part of the court determining such application, the exercise of appellate jurisdiction. Chief Baron Gilbert says: "The sentence by the canon and civil law was two-fold—interlocutory and definitive. The interlocutory was any order pronounced by the judges in the cause touching the proceedings before they came to a definite sentence; and the interlocutory order is always alterable before the definitive sentence. The definitive sentence must always be in writing, and can not be altered after it is pronounced and signed by the judge; but after it is so signed, they might appeal to a superior jurisdiction. But where they were in the last resort, as when it came up to the prince, there they might appeal from the prince uninformed to the prince better informed, which was in the nature of a review of the same sentence. Thus it is in the court of chancery; for all orders are interlocutory till they come to the definitive sentence, which is signed by the court; for that sentence, signed and enrolled, is the definitive sentence in the cause, and all preparations before that are but interlocutory. For the decree pronounced on the hearing, which is taken down by the register, is but an interlocutory sentence, till it comes to be signed by the *judge of the court and enrolled." Story's Eq. Pleadings, [709

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321, note I. This was probably the origin of our bills of review; and if so, in their very origin, when the cause was in a court of the *last resort*, by *appeal*, a proceeding in the nature of a bill of review to the decision of the same court, is called, by Chief Baron Gilbert, an *appeal*

A bill of review is, in chancery, what a writ of error *coram nobis* is at law, and if sustained, places the parties where they stood at the time the error occurred. The latter is sustained for error in fact only, while the former may be for either an error in law or for newly-discovered evidence, which could not possibly have been used at the time when the decree passed, or, at least, could not have been used by the exercise of proper diligence. A bill of review does, indeed, in many respects, assume the form of an original bill; but it can not, in its very nature, be an original action; it must necessarily be founded on a matter already litigated and determined between the same parties. Its effect on a decree in the same court is precisely what the effect of a writ of error is on the judgment of an inferior court. They are both founded on a previous adjudication, and the object of both is to reverse that adjudication. The one which originates in the Supreme Court to reverse the judgment of the district court, is said to be appellate; while the other, originating in the same court, to reverse its own decree, is said to be the exercise of original jurisdiction. It is insisted that it is essential to appellate jurisdiction that the cause must have *originated* in an inferior court; that the first step in the case must be taken in the lower court; and this is undoubtedly true as to the general acceptance of the term "appellate jurisdiction." It is true, under our constitution, that the only jurisdiction which our courts can have, may be said to be either original or appellate, and the difficulty in this case is to determine what is original and what appellate jurisdiction.

The district court, under our constitution, is capable of receiving no more original jurisdiction than the Supreme Court. The 710] *constitution provides in art. 4, sec. 6, that the district court shall have like original jurisdiction with the Supreme Court, and such appellate jurisdiction as may be provided by law. Nearly all cases originating in the court of common pleas may be appealed to the district court, and the judgment or decree thereby in effect vacated. The whole case is in the district court, and it makes a final decree; but it has no power to entertain a bill of review to its own

decree, because, as is claimed, that would be the exercise of original jurisdiction, and the bill filed in such case would be an original bill or suit.

Independent of any statutory provision, a court having equity jurisdiction could entertain a bill of review. The court making a decree could always review it, or, at any rate, a court having original chancery jurisdiction could do so. The only two cases in which this bill could be brought, are declared by the ordinances in chancery of Lord Bacon, one of which is, that "no decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review."

The entertaining a bill of review is a long-established practice of courts of chancery, a power incident (at least) to a court having original chancery jurisdiction. To prefer such a bill had become an established remedy to correct errors of the court making the decree. Our statute directing the mode of proceeding in chancery, did provide that any person who was a party to a decree of a court of chancery, his heirs, executors, or administrators, might file a petition for a review of the proceedings, in which such former decree was rendered, at any time within five years next after the rendering of such decree, etc. But I think it may be safely said that this section of the statute operated rather as a limitation of the time within which the petition might be filed than as conferring a power upon a court of chancery to entertain a bill of review. The power existed without this statute.

It seems to follow that before the adoption of the new constitution, *if chancery jurisdiction had been conferred on the court [711] of common pleas, it could, without the aid of a statute, have reviewed its own decree upon a bill of review. In such case, if the legislature had authorized an appeal to the Supreme Court from the original decree, thereby carrying the whole case to the Supreme Court, to be by it considered and determined, it would be strange if the appellate court could not review its own decree. It would, in effect, be appealing from the decision of a court of full and ample jurisdiction, to make a final decree, and afterward to correct errors in the decree to a supreme or higher court, with less jurisdiction, with less power, than the court from which the appeal had been taken. The lower court could, but the court higher in title could not, correct its errors made in its own decree. If such be the law, it must be based on the idea either that the higher court

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can not err, or that it is for the good of the public that there should be an end of litigation, whether the decree be wright or wrong.

Our old system of appeals from the decision of facts was almost peculiar to Ohio alone. It amounted to a second trial of the same case in another court. It was not confined to questions of law, but embraced the trial of questions of fact also. Under such a system, it would seem to be almost a matter of necessity that the Supreme Court should have at least as much power as the inferior court from which the case had been appealed.

The reasons for limiting the power or jurisdiction of an inferior and a superior court are very different. The reason for not conferring certain jurisdiction on a justice of the peace or probate judge, would not be the reason why the same jurisdiction should not be conferred on the Supreme Court. Various and cogent reasons might exist why *original jurisdiction* in all cases should be conferred neither upon the district nor the Supreme Court; but when the constitution makes these superior courts capable of receiving [712] *appellate jurisdiction*, and the law authorizes the *appeal, as it now does, of the whole case from the decision of the court of common pleas to the district court, no good reason can be given in such case for *limiting* the *power* of the district court over the case thus appealed, or for giving it less power than the court, from which the appeal was taken, had before the appeal. The district court should have at least the same power over the case and parties which the court of common pleas had. The constitution contemplated the right of appeal from the common pleas to the district court, and provided for appellate jurisdiction in that court of any amount of business, and therefore limited its original jurisdiction to the four cases mentioned in that instrument. If the code, which undertakes to abolish the distinctions between actions at law and suits in chancery, had never been passed, or should be repealed, and the distinction between the two jurisdictions still existed, or should be restored, we think, by a fair construction of our constitution, the legislature might confer, on either the district or Supreme Court, jurisdiction to review all decrees by them made in the same manner as if the cases had, or could have, originated in those courts. That a bill of review is not an original bill or suit, but depends entirely on the fact that the case has already been litigated in court by the same parties; that when a court of chancery acquires jurisdiction of a case by appeal, it has jurisdiction, by virtue of

its appellate power, to review its own decisions; and that a law, authorizing either of these courts to do so, would be a constitutional law.

We therefore come to the conclusion that power may, constitutionally, be conferred on either the district or Supreme Court to review its own decrees or decisions, after the expiration of the term at which the decree or decision was made. In coming to this conclusion, we have overlooked neither the arguments made, nor authorities cited, against the correctness of this conclusion. In some of the cases cited the law has been held otherwise. The opinion of the court, in the case of *Cox & Catron v. Breedlove et al.*, 2 Yerger, 499, is quoted at great length in the argument. *It [713 might, without fully examining the constitution and statutes of Tennessee, be very difficult to distinguish that case from the one under consideration. Indeed, the case is probably in point and against the opinion here expressed. The court in that case, after quoting various authorities to show what a bill of review is, says: "The prayer of the bill is, that the decree which has been pronounced may be reviewed and reversed; that the complainant may have a subpoena (which is an original process out of chancery) requiring the defendant to appear and answer the bill, and also for an injunction. All the parties to the original bill must be parties to the bill of review. What is all this but the exercise of original jurisdiction?" We do not assent to the correctness of this reasoning; all these things may be done in the exercise of appellate jurisdiction.

In a note to the argument of one of the counsel who supports this motion, various cases are cited to sustain the propositions contained in the argument. The case of the *Washington Bridge Co. v. Stewart*, 3 How. S. C. 413, is cited to support the proposition, "that the Supreme Court of the United States has no power to review its own decisions, whether in a case at law or in equity; a final decree in chancery is as conclusive as a judgment at law." The case itself did not present the point here made. It was not a bill of review. The original proceeding was a bill in equity, which had been appealed to the Supreme Court, and a decree made in that court affirming the decree of the court below. The case was then in the lower court, in pursuance of its original decree, referred to an auditor, and a final decree made. From this last decree a second appeal was taken, by the same party, to the Supreme Court, and

an attempt made in that court, upon the appeal from the second decree, to induce the Supreme Court to reconsider its first decree of affirmance. Judge Wayne, in delivering the opinion of the court, refusing to reconsider its first decision, on the second appeal, uses the very language quoted by counsel. The language used by Judge 714] Wayne is quoted from the opinion of Justice *Baldwin, in *ex parte* Sibbold, 12 Pet. 492. The case of *ex parte* Sibbold, was not a bill of review, but (in part) a motion to reform a mandate, issued by the Supreme Court to the court below. Justice Baldwin, in delivering the opinion of the court, makes use of the language above quoted, but adds: "Bills of review and writs of error *coram nobis*, at law, are *exceptions* which can not affect the present *motion*," so that, if any inference can be drawn from the expression used by Justice Baldwin, it would be, that a bill of review might be entertained by the Supreme Court. However that may be, neither of these two cases is authority against the right of a supreme appellate court to entertain jurisdiction of a bill of review. Another case is that of *Stafford v. Bryan*, 2 Paige, 45. It is claimed that this last case sustains the doctrine, "that a bill of review will not be allowed for newly-discovered facts, to review a decree affirmed in the court of errors, unless the right is expressly reserved in the final decree of the appellate court." The case is a short one, with a long syllabus. Stafford filed a bill against Bryan, in the court of chancery, for the purpose of recovering the amount of a lost note. The bill was dismissed, and an appeal taken from the decree of dismissal to the court for the correction of errors. Pending the appeal, Stafford examined Bryan as a witness in another case, and after such examination, applied to the court of errors to stay the hearing in that court, until he could apply to the court below for leave to file a supplemental bill, in the nature of a bill of review, for the purpose of showing that, upon such examination, the defendant admitted that he had not paid the note. That motion having been refused, and the remittitur, containing the affirmance of the decree of dismissal, being brought into the court below, Stafford presented a petition, in the lower court, for leave to file a supplemental bill, in the nature of a bill of review. The chancellor, refusing leave to file the petition, among other things, said: "If this court can review, on new evidence, a decree affirmed in the court of *dernier ressort*, it can 715] also review a decree which has *been reversed there. But I doubt the authority of the chancellor to do it in either case, unless

the court has expressly reserved to him that right. . If the facts in this case had been sufficient to authorize such a proceeding, a provision to that effect might have been inserted in the decree of affirmance. But if that decree was not in the way of this application, I think the facts in this case are not sufficient to authorize the filing of a bill of review;" and the chancellor dismissed the petition with costs.

It is not easy to see what direct bearing this case can have upon the question before this court. If the chancellor was right in supposing that the court for the correction of errors had power, and did decide the question, that a sufficient case was not made to authorize the filing of a bill of review, then he was undoubtedly right in not reversing the decision of the higher court; but if he means to say that, where a case is taken to the court for the correction of errors, for the purpose of reversing a decree of the chancellor, for errors apparent, and the decree is affirmed, and the cause remanded to the court below, and afterwards application is made to the court below for leave to file a bill of review, for newly-discovered evidence, discovered after the decree of the court above, the application must of necessity be refused; the accuracy of such an opinion may well be doubted, on the authority of the case of *Barbon v. Stearle*, 1 Vern. 416, and Story's Eq. Pl., sec. 408.

But we do not propose to review the case cited; we place our opinion upon what we think is the proper construction of our constitution, connected with the nature of our own appellate system, in operation for half a century before the adoption of the constitution, and at the time of its adoption, and upon a ground of authority that a bill of review is not an original bill or suit.

Still, however, it is claimed that the legislature has not conferred this jurisdiction upon the Supreme Court, even if it shall be considered appellate jurisdiction. I have already incidently, to some extent, considered this question.

*As before stated, the original decree sought to be reversed [716 by this bill of review, was made at the January term, 1853, of this court. The code did not take effect until July following.

By the 533d section of the code, it is provided that "the final orders or decrees of courts of chancery *heretofore* rendered, or which may be hereafter rendered, in any chancery proceeding pending when this code takes effect, may be reviewed in the same manner, and within the same time, as if this code had not taken effect.' The

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12th section of the schedule of the constitution, provides that the district courts, in their respective counties, shall be the successors of the present Supreme Court, and all suits pending in said Supreme Court, in the several counties of any district, shall be transferred to the respective district courts of each county, and be proceeded in as though *no change* had been made in said *Supreme Court*.

By the 5th sec. of the act relating to the organization of courts of justice, passed February 19, 1852, the judge of the district court or any judge of the Supreme Court, sitting therein, may, on motion of either party, reserve any important or difficult question, arising in any proceeding pending in the district court, for decision in the Supreme Court.

The Supreme Court may, by special mandate, require the district court or court of common pleas of the county in which any suit determined in the Supreme Court may have originated, to carry the judgment or decree of the Supreme Court into execution.

By the 1st sec. of an act regulating appeals, passed March 23, 1852, appeals may be taken, in all civil actions or suits, from the common pleas to the district court; and it is provided that the cause so appealed shall be again tried, heard, and decided, in the district court, in the same manner as though the district court *had original jurisdiction* of the cause.

By what is very appropriately termed by counsel "a labor-saving 717] process," the legislature, in 1853, passed an act to amend the act of July 19, 1852, by the 6th section of which it is provided, that "all process and remedies authorized by the laws of this state, when the constitution took effect, may be had and resorted to, in the courts of the proper jurisdiction, under the present constitution;" and all the laws regulating the practice of, and imposing duties on, or granting powers to the Supreme Court, or any judge thereof, and to the court of common pleas, or any judge thereof, respectively, under the former constitution, in regard to matters not hereinbefore provided for, etc., shall govern the practice, and impose like duties on the *district courts* and courts of common pleas, and the judges thereof, respectively, created by the present constitution, so far as the same are applicable to said courts, respectively, etc.

From the provision of the constitution above recited, in relation to pending suits, as well as from the legislature, since the adoption of the constitution, it is very clear, that it was intended that par-

ties to *pending* suits should be placed in no worse situation than those who became parties to suits instituted *after* the adoption of the new constitution. By the constitution, suits transferred from the old Supreme Court to the district court were to be "proceeded in as though *no change* had taken place in the *Supreme Court*." The very least that can be said of this provision is, that the right of action, as well as the remedy of a trial in the district court, without the necessity of commencing a new suit, should be saved to parties to pending suits. "The case should proceed, or go forward, precisely as though no change had taken place in the Supreme Court."

If the forms of action had not been abolished, and a suit in chancery had been commenced after the adoption of the constitution, and appealed to the district court, the case pending at the time of the adoption of the constitution, and transferred to the district court, and the suit commenced after the adoption of the constitution, and appealed to the district court, would both at least stand, in the district court, on the same ground, and the parties *in [718 each suit would have the same rights and remedies in that court. This, we think, is the very least effect which can be claimed for this provision of the constitution.

So, also, the very least effect which can be claimed from the 533d section of the code is, that if a decree had been rendered in any case, before the adoption of the code, that the decree might be reviewed in the same manner, and within the same time, as if the forms of action had not been abolished by the code, and no new mode of revising or reviewing judgments or decrees had been provided by the code; in a word, that if the right to a bill of review existed before the adoption of the code, that right was not taken away by the code.

The least effect which could be claimed for the "labor-saving" section, and the act to which it is an amendment, would be, that the remedy by bill of review might be used in the *district court* and court of common pleas, unless taken away by the constitution, or by some statutory provision; and if not taken away by either of these, then this section kept in force the chancery practice in relation to bills of review, precisely as if "no change had taken place in the old Supreme Court," and the district court had been its successor, possessing the same jurisdiction and powers of the old Supreme Court.

We have already said that, in our opinion, the constitution did

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not prohibit the legislature from conferring on the district or Supreme Court the power to review its own decisions. These sections of the statute, by any fair construction, conferred on the *district court* the power to entertain a bill of review, or any other remedy, not taken away by the constitution or statute; and so far from being *taken away* in this case by statute, it is saved, in a pending suit, by the code.

But we go still further on this subject, and, without the aid of the "labor-saving section," hold that the authority of law to appeal a case from the common pleas to the district court, when such appeal vacates the decree below (even if a lien is preserved), 719] *and where the case is retried in the district court, precisely as if it had not been heard in the court below, and where the district court is authorized to enter a final decree in that court upon the merits, such law necessarily confers on the district court the power to entertain a bill of review to its own decisions, such bill, in our opinion, not being an original suit, or bill, but a proceeding known and practiced for ages in courts of chancery, for the correction of its own errors. And not only for the correction of its own errors, but also for the purpose of opening a decree, to permit a party to introduce newly-discovered evidence, which he by no possibility could have introduced, on the hearing of the cause, before the final decree; evidence which would show the real truth in the case, change the decree, and do justice and equity between the parties. To say, because a case had been appealed to the district court, to be there (in the language of our statute of appeals) "tried, heard, and decided, in the same manner as though said district court had original jurisdiction of the cause," and that neither the district court, nor any other court, could entertain jurisdiction to review the decree of the district court for errors of law or newly-discovered evidence, would be to say that we had a judicial system in which plain justice could not be obtained by the citizen.

The district court has the same power over the parties and cause, by virtue of the appeal, as though it had had original jurisdiction of the cause. If such language does not confer on the district court as much power in the case as the court of common pleas had, it is difficult to conceive what language would confer such power. We are therefore clearly of opinion that the legislature has conferred power on the district court to review its own decisions, by bill of review.

Having therefore arrived at the conclusion, 1. That both the Supreme and district courts are, by the constitution, made capable of receiving jurisdiction to entertain a bill of review; and, 2. That such jurisdiction has been conferred on the district court *by [720 the operation of the appeal of the cause, without any other legislation for that purpose, it remains to be considered whether the same jurisdiction has not also been conferred on the Supreme Court; and this is the only question of doubt in the case.

When two cases are in the district court, one taken there by an appeal from the court of common pleas, and the other by being transferred from the old Supreme Court, they both occupy the same grounds. The court has at least as much power over the one as the other case, and the parties in each case have at least equal rights and remedies in the district court. If the district court makes a final decree on the merits, that decree may be reviewed, either for error in law, or for newly-discovered evidence. Suppose, however, that the district court makes no decree whatever, but is divided in opinion, or the judge of the Supreme Court, upon motion of one of the parties, reserves the case to the Supreme Court, to be there decided, and a final decree is made in the Supreme Court, can such decree be reviewed? is the question. The case is now in a court of the last resort, and it has made an erroneous decision, or new evidence has been discovered since the reservation, and since the decree; the decree must be reversed by this court of *dernier ressort*, or it can not be reversed at all.

It is one thing for the supreme judicial tribunal of a state or nation to say, we will not review our decisions; but it is quite a different thing to say, we have no power to do so. When such court has no other power than a revising power, perhaps it might well say, we can not review our decisions.

If this case, instead of being a bill of review to review a decree upon a bill of review revising the decree below, had been a bill of review to review a final decree, or an original bill, how would the case then have stood? In such case, there would have been no decree in the common pleas, for that would have been vacated and annulled by the appeal to the district court; there would have been no decree in the district court, for the *cause was, without de- [721 cree, reserved to the Supreme Court; and the only decree in existence, in any court, would be the decree in the Supreme Court, and, therefore, the only decree which could be reviewed. And so is the

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case before us. The appeal from the common pleas vacated the decree in that court; no decree could have been made in the district court, otherwise the cause could not have been reserved.

Upon what principles then did the original bill of review, upon which the decree was made in this court, get here? When the case was in the district court, that court had power to hear and determine the case, as though it had had original jurisdiction of the case. But the cause is reserved for decision by this court. Had the Supreme Court any less jurisdiction over the cause and the parties, upon the question reserved and decided, than the district court had? We think it had not; that the district court reserved the cause, as by law it had a right to do, and in that reservation, the same power over the question reserved, and parties, was conferred on the Supreme Court which the court had from which the case was reserved, viz., to hear and decide, as though the question had originated in the Supreme Court.

But again. By the act before mentioned, of March 14, 1853, it is provided that "all process and remedies authorized by the laws of this state when the present constitution took effect, not hereinbefore provided for, may be had and resorted to, in the courts of proper jurisdiction, under the present constitution." The meaning of this is, that the present courts, respectively, shall (so far as the constitution and laws since passed will permit) exercise the same jurisdiction that was exercised by their respective predecessors, when the constitution took effect. Now, when the constitution took effect, a bill of review was a "remedy" authorized by law; and the "court of proper jurisdiction" to entertain it, was the court in which the decree complained of had been rendered. This "remedy" is saved by the act, and the "court of the proper jurisdiction" is authorized to afford it; *that is, whichever of our courts has power to render the original decree, has power given to it by this act to afford the remedy, namely, a correction of error upon a bill of review. This court undeniably possessed the power to render the decree in question, and the above act gives it the power to correct its errors, if it committed any.

The motion to dismiss is overruled.

JAMES AND WILLIAM WILSON v. WILLIAM HAMILTON.

A ferryman, occupying a position in a line of public travel, and holding himself out for general employment, is a common carrier. His responsibility for the safe delivery of living animals transported by him, is the same as that in relation to the carriage of other property. It is the duty of the owner delivering property to a carrier which he knows requires peculiar care in its safe transportation, to make known the necessity, in order that the proper precaution may be used. If the owner takes upon himself the care of his property while in transit, and it is lost by his carelessness, the carrier is not responsible. But this rule only requires the owner to exercise care and diligence. That everything was not done that skill or prudence could have suggested, is no bar to a recovery.

RESERVED in Columbiana county.

This was an action on the case, brought in the common pleas of Columbiana county, October, 1852, to recover from defendant, as a common carrier, the value of a wagon and four horses and harness, lost in crossing the Ohio river on defendant's ferry-boat. The verdict in the common pleas was for defendant, whereupon the plaintiffs appealed to the district court, which reserved the case for decision here.

*The plaintiffs introduced the admission of defendant, as [723 follows :

The defendant admits that he was a ferryman, when the horses and wagon and harness were lost ; that he then ran a ferry-boat, and still runs one, between Wellsville, Ohio, and Hamilton, Virginia, ferrying with it across the Ohio river ; that he is still a ferryman at said place, across said river, and was for a long time previous to the above occurrence.

Defendant also admits, that said four horses and wagon and harness were, when lost, the property of plaintiffs ; that said horses, wagon, and harness went upon his said ferry-boat, at the time alleged in this declaration, to be conveyed across the Ohio river, from Wellsville, Ohio, to Hamilton, Virginia, directly opposite Wellsville, on the Virginia side of said river ; that while crossing said river, on his said ferry-boat, said horses, with harness and wagon, got off said boat into said river, and said horses were drowned, and said wagon and harness lost.

Wilson v. Hamilton.

Defendant also admits, that I. B. Cowen, a witness on former trial, did swear, and if now present would swear, that said horses, when drowned, were worth \$450; that said harness was then worth \$16, and said wagon was worth \$30; that he has lived near plaintiffs, in Pennsylvania, for several years, and knew the above property; that said horses were quiet and gentle, and that defendant told him—a few days after the loss of said team, and when he came over with one of plaintiffs to Hamilton, where defendant lives—to take some action about said loss; that said team was drowned; that he had taken the same over to the Ohio side, on his ferry-boat, the day before said occurrence; that defendant then said, when he saw said team come down, on the day of the occurrence, to cross said river on his said boat—which was a steam ferry-boat—he (defendant) had waited until said team came down, and took the leader by the head and led them onto his said boat; that he (defendant) had seen said team go off the boat, while he was standing on the wharf-boat, at the Ohio side of said river.

724] *Defendant admits, that Samuel McConnell, a witness on the former trial, did swear, and if here would swear, to same value of said property; that he had known said team for years, and lived near plaintiffs, and that said team was quiet and gentle.

They also gave in evidence the deposition of Thomas Hughes, who testified that he saw the team go off the boat into the river, and they were drowned. Saw Mr. Wilson have hold of the saddle-horse, and a man named William Pickering had hold of the horses at the end of the tongue, about the time the boat started. The horses appeared restless, and when the saddle-horse started forward, the engineer, who was watching the horses closely, stopped the engine. That he (witness) then saw the forward horses looking down into the water, standing on the apron. They were forced into the water by the saddle-horse, and witness' impression was, that the apron broke when the forward horses went down into the water. Thinks it was the jerk of the forward horses going into the water that caused the apron to break. Thinks that the horses could not have been saved if the apron had not broken. That the boat was a few rods from the Ohio shore when the horses went overboard; that Samuel Williamson was steersman of the boat, and a boy named Tommy was in charge as engineer; they were at their posts and appeared to be doing their duty; that he has been used to cross the Ohio river at various points, and saw

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nothing on the ferry-boats different to what he saw on the boat in question. That defendant owns the ferry-boat; that no gates or bars were on the boat when the horses were lost, and that defendant has put them on since. That Pickering was a passenger, and that neither the steersman nor engineer were called to give assistance to plaintiff after the boat started.

The defendant having further admitted that he was a regularly licensed ferryman, the plaintiffs then rested their case, and defendant offered in evidence certain depositions, which were in substance as follows: Wm. Moore testified that he was on the wharf-boat, on the Ohio side, and saw Wm. Pickering trying to *pull the two fore-horses round with their heads to the boat; [725 the horses were unmanageable, the wheel-horses forcing the others overboard. That Williamson is a good ferryman, and that it is the custom for persons crossing with teams to take charge of their own horses. The engineer was a small boy. He is about sixteen years of age, and witness thinks he understands his business very well.

George Johnson testified, that he has been in the habit of crossing the ferries on the Ohio river. The custom in relation to defendant' ferry, as far as witness knew, was for men crossing to take care of their own teams.

Martha Myers deposed, that Mr. Wilson came into her house immediately after the horses were lost. Mrs. Hamilton asked him if he blamed the ferryman. He replied that he blamed no one but himself. He said he should have taken the horses out; that they got scared, in the first place, at the depot in Wellsville, and when they came on the boat they had not got over the fright. He said when the boat started, the horses ran over into the river. He said he ought to have taken them out, for when the horses got frightened, forty men could not have held them. That (she) witness has lived in the house of defendant a number of years. The conversation between Wilson and Mrs. Hamilton was shortly after the team was drowned.

Matilda Hamilton, daughter of defendant, gave evidence corroborating that of Martha Myers.

Robert Sproll deposed, that he was on the wharf-boat at Wellsville, and saw Wilson with his team on the ferry-boat. He had hold of the saddle-horse. When the boat shoved out from the landing, and the wheels had made one or two revolutions, the horses

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commenced running, and ran to the end of the apron of the boat. The wheel-horses shoved the lead-horses into the river. The weight of the horses in the river and of the wheel-horses in the act of plunging in, broke the levers of the apron. Does not think that the 726] horses could have been saved if the apron *had not broken. The boat was a good one; the ferryman and engineer were attending to their duties; the accident was the fault of the horses; heard Wilson say, that evening, that it was his own fault, and that he did not blame the ferryman, or any one on the boat. He said the horses were frightened at the depot at Wellsville, and that no one man could hold the saddle-horse when he was frightened. He blamed himself for not unhitching them.

Thomas Henry, engineer on the ferry-boat, deposed, that the engine had made but one or two revolutions when he shut off the steam and stopped the boat. The horses were uneasy and had commenced running; Wilson had hold of the saddle-horse, Wm. Pickering of the lead-horses. He had partially succeeded in turning the lead-horses inward on the apron, when the wheel-horses crowded them into the river. The horses could not have been saved if the levers of the apron had not broke; the levers were good. Ferryman and himself were in the performance of their respective duties. Wilson had the management of the horses. He did not request Williamson or witness to take charge of them. The custom on the river is for teamsters to take charge of their own teams in crossing.

Wm. Englebright deposed, that he owns the Steubenville ferry, and has been in the occupation of a ferryman eighteen years. It is customary for teamsters to take care of their own horses on the ferry-boats. It is not customary to have fastenings on the boat to prevent teams from going overboard. The aprons are not intended for teams to stand on, and are not strong enough for that purpose.

Nathaniel Wells deposed, that he has been engaged in the ferry business for seventeen years, at Steubenville. It is the duty of the teamster to drive on board the boat and take care of his team. Knows of no custom requiring the steersman and engineer to pay attention to teams while crossing. Knows of no fastenings on ferry-boats but the firm grips of the teamsters at the heads of their 727] horses. The aprons are for dropping on the landings to *enable the teams to drive on and off. Teams are not allowed to stand on them.

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George Hamilton deposed, that he is the son of defendant. The evening after the loss of the horses, he heard Wilson say to his mother that he blamed no one but himself for the loss of his horses. They had been frightened at the depot, and had not got over it when they reached the ferry-boat. He said he should have unhitched them. The plaintiffs got, of the property lost, the wagon-bed, the harness, and the fore-carriage of the wagon. Mr. Wilson came to father's, and took them away.

Barnard Wintringer deposed, that it is customary for teamsters to take care of their own horses on ferry-boats. It is not customary to have fastenings for teams.

The plaintiff objected to all the depositions offered for the defense. The defendant then called Charles Hamilton, who testified that he was down at the river on the day the horses were drowned; that he did not see the horses go off the boat, and did not see the boat till it had drifted back and struck the Ohio shore; that he then saw defendant running up along the beach, and thinks he was not on the boat when the horses went off. Whether he was on before the boat started or not, he does not know. Wilson came off the boat with his whip in his hand, and said to witness: "My horses are lost. I don't blame the ferryman. It is my fault. They got scared at the railroad depot, and like to have run away with me, and I had hard work to stop them. I ought to have unhitched them when I drove onto the boat. They were not over their fright when I drove them on the boat." I am a cousin of defendant. I have run this same ferry-boat since the horses were lost. We never use bars or gates on it—none except for stock; it is a good ferry-boat.

Also, Samuel B. McLean testified, I am a brother-in-law of defendant, and have been running on river, upon steamboats, for twenty years. I know the ferry-boat at Wellsville. It is a very good boat. My experience is, that bars or gates are not used except to ferry stock across the river. I have run on the [728 river for twenty years, and am acquainted with the rivers from Pittsburg to New Orleans, and have crossed at many of the principal ferries. The ferry-boat run by defendant is about seventy-five feet long and sixteen wide. I have seen three or four teams cross on it at once.

Also, Thomas Johnson testified, that he crossed the Ohio river at several ferries; that he knew the ferry-boat run by defendant

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to be a good one, and never had seen bars or gates used upon ferry-boats except for stock in crossing.

Also, A. S. Brewer, who testified that he had crossed the Ohio river at Wellsville, and at Cincinnati; that he had crossed on foot at Cincinnati; never crossed with a horse; had seen teams crossing upon them, but did not see bars or gates used.

Also, Simeon Jennings testified, that he had crossed the Ohio river, and other ferries, at different places, but never saw bars or gates used except for stock.

The defendant here rested his case, and the plaintiff then called to the stand Thomas Grafton, who testified that he resided in Wellsville, and kept a livery stable; that his stable was near the hotel of Benjamin Way, about forty rods from the railroad depot, and between the depot and the landing-place of the ferry-boat; that he was always much in the habit of noticing and observing horses; that on the day the horses of the plaintiff were lost, he noticed them passing his stable, as they were on their way to the ferry-boat landing; that the horses arrested his attention at once, as they were fine-looking and high-spirited; one of the wheel-horses was pulling hard and looking back. The team stopped in front of Way's hotel, and stood there for about half an hour before it was driven onto the ferry-boat. He went up and examined the horses while standing there; no one was holding them, and Mr. Wilson, who drove them, was in and out of the hotel occasionally. They stood quiet, and did not appear as if frightened. They were in 729] good order, high-spirited, and held their heads up, *noticing things about them, as horses in that condition usually do. The team went from there down to the ferry-landing, and onto the boat, a few minutes after which he heard it was drowned. That he had crossed on defendant's ferry-boat often, and that there were usually no gates or bars put up when ferrying over teams, but after this accident they were put up; that he had crossed at Smith's ferry, and at Steubenville, a good many years ago, and did not recollect of there being any gates or bars put up.

Plaintiffs then called Joseph G. Keith, who testified that he had been engaged for several years in driving horses and cattle, and crossed a good many ferries; among them, he had crossed the Shenandoah river several times, and had crossed the Ohio river at Smith's ferry a few years ago, and believes, in 1852, had seen teams and horses ferried across the river at Cincinnati; he had al-

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ways seen bars or gates used upon the ferry-boats at each end, and had never seen horses or teams ferried across a river without them. He had crossed the Shenandoah river with horses, and had crossed at Smith's ferry with one horse and carriage; that Smith's ferry was a ferry across the Ohio river, nine miles above Wellsville; that he considered gates and bars necessary for the safe transportation of a team of four horses across the Ohio river on a steam ferry-boat.

Joseph H. Quinn being called, testified that he had been engaged for several years past in driving horses, cattle, and sheep, and had crossed many ferries, among which he had crossed at Smith's ferry on the Ohio river, nine miles above Wellsville; that he had also crossed ferries on rivers in Pennsylvania, and that he had crossed the Missouri river at St. Louis; he had crossed the rivers in Pennsylvania with horses, and once with three or four horses; that he had crossed at Smith's ferry with one horse in a carriage, and one loose, which he had led; that he had always seen gates or bars used, whether he crossed rivers on ferry-boats with one horse or more, and that he considered bars or gates necessary to be used upon a ferry-boat to transport a team of four horses across the Ohio river safely.

*James Martin being called, testified that he had for some [730 years past been engaged in driving horses and cattle, during which time he had crossed various rivers in Ohio and Pennsylvania; that he had always seen bars or gates used on all ferry-boats where he had crossed; that he had crossed at Smith's ferry, and they were used there, and that he considered bars or gates were necessary upon a ferry-boat, whether there was one horse or more upon it; and that, in his opinion, bars or gates were necessary upon a ferry-boat, in order to enable it to transport a team of four horses safely across the Ohio river.

J. H. Wallace being called, did testify that he had frequently crossed the Ohio river at Smith's ferry, and at other places, among which was at Wellsville; that bars or gates were not used at Wellsville, but were used at Smith's ferry and other places; that he crossed at Smith's ferry several years ago, and the first time he crossed, his horse was restive, and it was difficult to get him onto the boat. They used bars there then, when he crossed with this one horse, and always afterward used bars or gates when he crossed with the same horse, and when he crossed it with other single

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horses; that he believed the custom was to put up bars or gates upon the ferry-boat whenever one horse or more was ferried across, unless they knew the team, and that it was accustomed to crossing on the boat, and that he believed bars or gates were necessary to be put up, to convey a team of four horses safely across the Ohio river upon a ferry-boat.

J. W. Castlebury being called, testified that he had been accustomed to traveling, and had, within the years last past, probably crossed two hundred ferries in Ohio and elsewhere; that he had always seen bars or gates used upon a ferry-boat wherever he had crossed rivers, whether he had one horse or more; that he had never seen a team of horses ferried across a river without them; that he had always required them to be put up, if not done by the ferryman of his own accord, and that he considered bars or gates necessary to be used upon a ferry-boat in order to transport a team of four horses safely across the Ohio river.

731] *And the plaintiff having rested his case, the court made an order reserving the same for decision in the Supreme Court of Ohio.

Lee & Gilman, and J. W. Reily, made the following points:

Defendant is a common carrier, and is liable as such. All the elementary authors declare a ferryman is a common carrier. See Story on Bailments, sec. 496; 2 Kent, 767; Ang. on Carriers, sec. 130; Babcock v. Herbert, 3 Ala. 392; Smith v. Seward, 3 Barr, 342; Pomeroy v. Donaldson, 5 Miss. 36. If defendant is a common carrier, he is clearly liable; for this loss did not occur by the act of God, inevitable accident, or from the act of the enemies of the country, the only events which release the common carrier from liability. See Angell on Carriers, sec. 67; Story on Bailm., sec. 510; 2 Kent, 772; and all other elementary authors on the subject.

But it will be claimed that a difference exists between the liability of a carrier of live animals and a carrier of inanimate matter. We hold the rule is the same, let the carrier convey what he will. He is liable to the full extent of the rule "for the safety of animals of the brute creation, delivered to him for transportation." Angell on Carriers, sec. 214; Story on Bailments, secs. 576, 577.

The rule reaches to human beings, or slaves, and there termi-
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nates. Its tension has never been relaxed in favor of animals—brutes. See *Boyce v. Anderson*, 2 Pet. 150—where the carrier is held to be responsible in the transportation of slaves only, “for negligence or want of skill,” because slaves are held to be “intelligent beings,” and are placed on the same footing as other passengers. But the above rule is in this case affirmed by the court, and the carrier’s liability is declared to exist in its full extent, for everything which he transports except “human beings.” The only cases where ferrymen have escaped liability for property lost, have been where the loss was occasioned by the *negligence [732 of the owners of property themselves. We do not think the case of *Willoughby v. Horridge*, 16 Eng. Law & Eq. 437, reaches this point; but of this kind is the case of *White v. The Winnisimmet Co.*, 7 Cush. 155. In this case, the plaintiff had driven onto the ferry-boat and chosen his own location for his horse, and neither committed his horse to the custody of the ferryman, or expressed any wish to do so. By plaintiff’s own negligence, the horse being left unattended, was frightened at the ringing of the bell, and jumping overboard, was drowned. Here the court held, that “when such horse or other animal is not surrendered into the custody of the ferryman, the driver is bound to do all that can be effected by reasonable diligence and supervision to prevent a loss of his property, occasioned by the horse becoming restless or affrighted. If the traveler wholly neglects his duty in this respect, leaving his horse without any oversight, and the horse, without the fault of the ferryman, becomes affrighted and throws himself, and vehicle to which he is attached, overboard, when by proper care and attention of the driver this casualty would in all reasonable probability have been avoided, the loss must fall upon the traveler.” Now, this is the strongest case tending to exempt ferrymen from liability which can probably be found, and is in direct contradiction to the doctrine of *Cohen v. Hume*, 1 McCord, 139, where the court hold, “as soon as a carriage is on the drop of a flat, though driven by the owner’s servant, it is in the ferryman’s possession, and he is liable for any subsequent damage that happens to it or to the horses.” This seems to us reasonable doctrine. The traveler and his driver are, for the time being, under the control of the ferryman, and become “*de facto*” his servants, when they drive onto his boat. Such also is substantially held in *Miles v. James*, 1 McCord, 457, and in *Rutherford v. McGowan*, 611

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1 Nott & McCord, 17. But even granting to defendant the full force of this case in Cushing, it does not affect the case at bar; for the court in that very case hold, by necessary implication, if the 733] plaintiff *had either delivered his horse to the ferryman, or had exercised a reasonable supervision over him himself, then the ferryman would have been liable.

W. K. Upham, for defendant, made the following points:

I. That the law, applicable to common carriers of goods and merchandise, which makes them responsible for every loss which is not produced by inevitable accident, does not now apply to *carriers of animals*; that a sound distinction can be, and is, taken between an animal with power of locomotion, and of volition, and a package of goods which can be "stowed away," subject only to the will and convenience of the carrier.

II. That the responsibility of the carrier of animals should be, and is, measured by the degree of care which he exercises in his business and employment; that he is bound to take great care in their transportation—that slight negligence will charge him.

III. That where an injury is produced, or a loss sustained, by negligence, the injured party has no remedy against the other, if his own negligence concurred in producing the result.

IV. That in case of animals sent or taken by a carrier, that the carrier is not liable for an accident, or loss, arising from the "animal's own viciousness or want of temper." Angell on the Law of Carriers, 222, sec. 214 a.

V. That the loss in this case occurred from the negligence of the plaintiff—that the carrier was in no fault, and performed all the obligations under the law.

Chief J. Marshall, in Boyce v. Anderson, 2 Pet. 156, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases."

734] *The rigorous rule of law, as applicable to carriers, had its origin and foundation in considerations of public policy and public protection, and in the early cases it was only applied where the entire and exclusive custody and control of the thing or article carried was in the carrier, and the owner or consignee of the thing or article carried was not present. The policy of the law was to impose upon the public carrier the highest degree of care and diligence in the safe

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carriage and delivery of property intrusted to him. The rule itself making the carrier responsible for every loss which is not produced by inevitable accident, *ex vi termini*, imports exclusive custody and control in the carrier—that “absolute control” which is not to be qualified by any considerations of humanity to the object carried, or in any manner limited by the volition, animation, or power of locomotion, of the subject of the contract.

As commerce has advanced, and means of communication have been opened up, the carriage of animals upon public conveyances, and by public carriers, has become common, and an important and valuable part of internal commerce.

It is true that we have had ferries in existence and in operation in this country, and in England, for a long period of time—it is also true that the elementary works of the law, and some adjudged cases, have laid down the rule that a ferryman is a common carrier; and Chief Justice Gibson, in *Smith v. Seward*, 3 Penn St. 342, says “a ferryman is undoubtedly liable as a common carrier, and with no greater restriction of his responsibility;” yet these writers, and cases, must not be understood to hold, that in the conveyance of live animals, the public carrier is an insurer of the property.

The case of *Smith v. Seward*, above cited, was a case in which “there was no fall-board at the end of the flat used as a ferry-boat, and it being insecurely fastened to the shore, the wheels of the wagon striking the side of the boat as it was being driven on board by the ferryman, the flat was shoved from the shore and *the [735 horses fell into the river and were drowned.” *Miles v. James*, 1 McCord, 457, is also very similar; and in all the recent cases upon this subject, in which the responsibility of ferrymen has been discussed, it will be found that, where the ferryman has been charged, it has been on account of his negligence in the management and conduct of his boat, or in consequence of insufficiency or defect of the boat itself.

The language and reasoning of the court, in the case of *Boyce v. Anderson*, applies, in all its force, to the carriage of live animals. A horse “can not be stowed away as a common package; not only does humanity forbid this proceeding, but it might endanger its life or health.” A horse could not be disposed of as a “bale of goods” no more than a slave. “The carrier has not and can not have the same absolute control over it that he has over inanimate matter.” It would seem reasonable, therefore, that the respon-

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sibility of the carrier of live animals should be mitigated, and that the great "rigor" of the old law should be made to yield to the wants and conveniences of trade and commerce. The carriage of live animals by public carriers is of comparatively recent date; and recent decisions in this country and in England have molded the old law to meet the present exigencies.

The cases of *Willoughby et al. v. Horridge*, 16 Eng. L. & Eq. 437 (23 Law I. 90), in England, and *White v. The Winnisimmet Company*, 7 Cushing, 155, in this country, have placed the law, as we claim, upon its proper and just foundation—establishing "a modification of the liability attached to common carriers, as the nature of the thing to be carried and the extent of the custody and control over it by the carrier varies." We then plant ourselves upon the principles established by these cases, and proceed to the examination of the other questions involved in the case.

The case shows, and it is admitted, that the ferry-boat was new, strong, and well built, and the only complaint which is made [736] *by counsel in relation to the boat is, that it was not provided with bars or drops at each end. I will here refer to the testimony upon the part of the defendant, given by steamboat men and others familiar with the ferries on the Ohio and other rivers. They say that the bars and drops are only used in the ferriage of stock in droves or numbers. Now, I claim that the bars are of no sort of use; that they would present no obstruction to a frightened horse; that the universal absence of them, as testified by witnesses, is evidence that they are not necessary for the protection and safety of the horse. There is no dividing line; the law is satisfied if the ferryman provides a strong, safe, and well-built boat, and manages and conducts it with care and with all prudence, or the law imposes upon him the obligation of providing against the possibility of injury or loss.

Undoubtedly, an inclosure or pen could be built in a manner and of materials that would effectually restrain and contain a frightened horse despite all his attempts to escape, but is not the whole duty of the ferryman performed when he furnishes a boat well built and well manned? If the plaintiff was guilty of negligence, and that negligence contributed to the loss of the property, then he can not recover. This is a familiar principle, and upon its application the case in 7 Cushing, before cited, turned.

The cases of *Cohen & Hume*, 1 McCord, 139; *Rutherford v. Mc-*
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Gowan, 1 Nott & McCord, 17, and the case cited in 12 Ill. 344, are all cases in which the attempt is made to hold the ferryman to all the rigor of the old law; to make him an insurer of the property placed upon his ferry-boat; to hold him responsible for all loss not occasioned by the "act of God or the king's enemies." In order to do this, they are compelled to resort to the fiction, that at the moment the team and the owner are upon the ferry-boat the owner in charge of his own team becomes the servant of the ferryman. No matter with how little care or with what degree of negligence the owner conducts himself, being *pro tempore* the servant of the ferryman—notwithstanding his acts *of omission and com- [737 mission, the ferryman is liable at all events. To carry out the fiction, the ferryman would be responsible if the owner of the team himself caused the loss. These cases are directly opposed, in principle, to the cases cited above (7 Cushing and 16 Eng. L. & Eq.), and must yield to them in point of reason and authority.

RANNEY, J. It is with much difficulty that this cause can be retained for decision in this court. The district court, to which it was submitted—a jury being waived—instead of finding the facts, and then sending the questions of law arising here for determination, after hearing the evidence ordered it to be set out in the record, and the facts, as well as the law of the case, to be reserved.

It is not, however, open to the objection which availed to remand the case of *Hubble v. Renick*, 1 Ohio St. 171. In that case the reservation was ordered upon the motion of one of the parties; and we held that the court could not, in that manner, compel the other party to submit the finding of the facts to the judges of this court. In this case the reservation is made upon the motion of both parties; and, of course, both have waived that objection. But it is still open to the serious difficulty, that it requires us to settle facts before we can arrive at the questions of law involved; and is, so far, opposed to the spirit and policy of the act organizing this court, and to the objects and purposes for which it was created. We shall not, therefore, as a general rule, entertain jurisdiction of cases at law, upon reservation, even at the instance of both the parties, until the facts have been settled in the district court, either by an agreed statement, or a finding of the court or jury. We only depart from the rule in this instance because it has not hith-

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erto been well understood, and because the facts in this case are of easy solution.

We have been wholly unsuccessful, after very careful research, in finding where it was even doubted that a ferryman, occupying 738] *a position in a line of public travel, and holding himself out for general employment, was not a common carrier, and, as such, subject to all the liabilities incident to that position. That he is such is unqualifiedly asserted by the best text-writers, and enforced in a large number of decided cases. Angell on Carriers, secs. 82, 130; Story on Bailm., sec. 496; 2 Kent's Com. 599; 3 Barr, 342; 5 Missouri, 30; 1 McCord, 444; 1 Nott & McCord, 19; 8 Ala. 96; 11 Leigh, 521; 12 Ill. 344; 10 M. & W. 161.

But if we were without direct authority, and compelled to rely upon the spirit of the law relating to common carriers, we should find ourselves unable to assign any sufficient reason for imposing a higher responsibility upon one carrying persons and property along a river, than were exacted of those engaged in carrying them across it. The employment of the latter is no less emphatically of a public character than that of the former; while every consideration of public policy is equally as applicable in the one case as in the other. Indeed, in one point of view, the argument is generally strongest against the ferryman. Most other channels of transportation by water are open to free competition, and those who employ the carriers upon them have an opportunity to choose who they will trust; but the ferryman is generally secured in the exclusive privilege of using the particular locality, and under terms to coerce employment from all those whose business or convenience requires them to cross at the particular place.

We have been no more fortunate in finding any sufficient support for the position that the responsibilities of a common carrier, in respect to other property, do not attach to the carriage of living animals. No such distinction has anywhere been recognized. The contrary is expressly laid down by the elementary authors to which I have referred, as well as in several of the cases cited; to which may be added others. Angell on Carriers, sec. 214; Story on Bailments, sec. 576; Stewart v. Crawley, 2 Stark. 323; Porterfield v. Brooks, 8 Humph. 497; Palmer v. Grand Junction Railway, 4 M. & Welsb. 749.

739] *The nearest approach to anything sustaining his position, which the learned counsel for the defendant has been able to pro-

duce, is *Boyce v. Anderson*, 2 Pet. 150; in which it was held, that the carriage of negro slaves did not impose upon the carrier the same responsibility as the transportation of inanimate matter. There can be no doubt of the correctness of this decision. The chief justice very conclusively shows that the carrier can not, consistent with humanity and regard to the life and health of the slave, have the same absolute control over an intelligent being endowed with feelings and volition, that he has over property placed in his custody; and that such an undertaking was not to be distinguished from the ordinary one for the carriage of passengers. But these reasons can certainly have very little application to the transportation of brute animals, without judgment or intelligence to provide for their own safety, and which may, with suitable accommodations, be effectually secured and confined. This question has, within a few years, from the great numbers of domestic animals now carried from the west to the east, by land and water, assumed a very decided importance; but we can feel no hesitation in declaring that those who undertake their transportation, take upon themselves the obligation to deliver them safely, against all contingencies, except such as would excuse for the non-delivery of other property. Neither of the late cases, of *Willoughby v. Horridge*, 16 Eng. L. & Eq. 437, and *White v. Winnisimmet Company*, 7 Cush. 155, are opposed to either of the propositions, which we have regarded as settled. In the last, and much the strongest for the defendant, the court, after stating that the delivery of a bale of goods to a ferryman, to be transported, would impose upon him the strict liability to carry it safely, against all contingencies except the act of God or the public enemies, proceed to say: "The principle above stated, would embrace the case of a horse and wagon, received by a ferryman, to be transported by him on a ferry-boat; the ferryman accepting the exclusive custody of the same for such purpose, and the owner [740] having, for the time being, surrendered the possession to the ferryman." But it appeared, in that case, that the owner selected his own place upon the boat, retained the exclusive custody of the horse and wagon, neither committing them to the custody of the ferryman, nor signifying a wish to do so, and that they were lost by his own carelessness. Without indorsing everything said in the opinion, we can not doubt that judgment was correctly given for the defendants. The rule which fixes the liability of common carriers, is, it is true, one of great rigor; and while it is equally true that the

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reasons upon which it was originally founded, have in a measure ceased to be applicable, still others of greater cogency, growing out of the exigencies of modern commerce, have taken their place, and have made the continuance of the rule indispensable to the safety of the public, and every relaxation of it the subject of regret with the most enlightened judges. In my opinion, this court has gone quite far enough, in allowing the carrier, by special contract, to exempt himself from responsibility as an insurer for losses occasioned without fault on his part. *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, *ante*.

But while this strict liability of the carrier is necessary to the public security, and, in our opinion, not to be relaxed, we are never to forget that he also has rights which deserve to be scrupulously guarded. While the law holds him to the strictest accountability, it requires those who deal with him to act with the utmost good faith; and if the loss can be traced to their fault, it is plain there can be no recovery. It is but the dictate of common honesty, that he who delivers property to a carrier, knowing that it requires peculiar care and attention to its safe transportation, should make known to him the necessity, in order that the proper precaution may be used—*Orange County Bank v. Brown*, 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 85; *Miles v. Cattle*, 6 Bing. 743—although the principle has not been extended so far as to require a disclosure of 741] the peculiar value of the property, unless inquiry is made by the carrier. *Sewall v. Allen*, 6 Wend. 349; *Hollister v. Nowlan*, 19 Wend. 234; *Phillips v. Earl*, 8 Pick. 182; *Sleat v. Flagg*, 5 B. & Ald. 342.

It is upon a similar principle, of requiring good faith and reasonable diligence from the owner, in his dealings with the carrier, that it has been held, that if the owner of goods accompanies them to take care of them, and is himself guilty of negligence resulting in loss or injury, he is not entitled to recover. *Brind v. Dale*, 8 Car. & P. 207. Nor are we disposed to adopt the artificial reasoning of some of the cases, which makes the owner or his servant, in such case the servant of the carrier, and the latter responsible, notwithstanding the negligence of the former. It is the right of the owner to commit his property to the exclusive custody of the carrier, and the latter has no right to decline to receive it; but if the owner sees fit to take upon himself any duty connected with the carriage, he does not lose his position as an in-

dependent party to the contract, and is bound to discharge it with fidelity. But this rule, in its application to the undertakings of a ferryman, is not to be received in too broad a sense. The very nature of his employment requires him to transport all sorts of persons, many of whom would be wholly incapable of furnishing assistance, and most of whom must be very imperfectly acquainted with the precautions necessary to the safety of the horses they drive. He would have no right to place any reliance upon an infirm man, a woman, or a child, to manage a frightened horse, which it would require a strong man, with presence of mind, to do; and, in any case, all that he could require would be that the party should have attempted to perform, in good faith, what he had voluntarily assumed. That everything was not done that skill or prudence could have suggested, can never be made an objection to a recovery.

To bring himself within the purview of these limitations upon the carrier's liability, the defendant insists that one of the horses *lost was particularly vicious, and had been frightened, [742 shortly before coming upon the boat, by a train of cars; that these facts should, in good faith, have been communicated to the defendant; and that the plaintiff did not, in all respects, conduct himself properly at the time the accident happened. In our opinion, no part of this claim is sustained by the evidence. There is nothing to show that the horse was *vicious*. The greatest sin proved upon him is, that he was spirited; and while it is true that he had been somewhat frightened in the manner stated, some time before going upon the boat, the fact that he had stood in the street, alone, and without being hitched, for half an hour afterward, effectually removes all imputation of bad faith from the plaintiff, for not mentioning a circumstance which he must have considered of no importance. We are at a loss to know what more the plaintiff could have done, at the time of the accident, than he did do. The defendant placed the team upon the boat, and then went on shore, leaving only the oarsman, and a boy to act as engineer, to manage it. They did not, and probably could not, leave their positions; and the plaintiff, having no assistance but another passenger, seems to have exerted all his power to prevent the team from going off the boat. We see nothing in his conduct, or the law of the case, to bar a recovery.

2. But if we had taken a different view of the legal questions

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fixing the defendant's liability, we should still be brought to the same judgment. It is conceded that he must have furnished a strong, safe, well-built boat, and have managed it with care and prudence, and that even slight neglect would charge him. And it is further admitted, that this boat was wholly unprovided with either bars, gates, or chains at the ends, to prevent the escape of horses from it. As to the necessity for these precautions, there is a conflict in the evidence—the greatest number of witnesses, perhaps, expressing the opinion that they are not necessary. But this does not relieve us from the obligation of scrutinizing the grounds 743] upon which these opinions are based. Now, as a matter *of common sense and every-day experience, we do know that a large proportion of the horses transported are unaccustomed to the noise of a steam-engine; and equally well, that more or less of them will become restive when they hear it, and that the difficulty of restraining them will be greatly increased when, as in this instance, a number are hitched together. Under such circumstances, to place a team on board, with no assistance provided in case of fright—the ends of the boat being entirely open, and with a projecting "apron," just sufficient to allure the horses upon it, but insufficient to hold them—we can not regard as an exercise of that scrupulous care which it is conceded the defendant was bound to exercise. It is not enough that this and other ferries may, for a considerable time, have carried horses safely without these precautions. If, for the want of them, losses should occur but seldom, they are still such as might be readily anticipated, and easily provided against.

There must be judgment for the plaintiffs.

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ACTION—

1. If one person, on sufficient consideration, make a promise to another, for the benefit of a third person, such third person may maintain an action at law upon the promise. *Thompson v. Thompson*, 333.
2. Remote negligence of a plaintiff will not prevent recovery for injury to his property, immediately caused by defendant's negligence. Plaintiff's negligence to defeat recovery must be a proximate cause of the injury. *C. C. & C. Railroad Co. v. Elliott*, 476.
3. A is restrained by injunction from making a race to his mills. Injunction bond binds obligors to pay all moneys and costs due, and to become due, from complainant, and all moneys and costs which shall be decreed against him. Bill dismissed at complainant's cost. *Held*, A has an action on the bond against complainant and sureties for the damages sustained by reason of the injunction. *Roberts v. Dust*, 502.
4. A trial of the right of property, with order of restitution, and a return of property under the order, are no bar to an action by claimant against the officer, for the seizure and detention of the property. *Abbey v. Searls*, 598.
5. *Money paid upon a mistake of facts*, and without consideration, may, as a general rule, be recovered back. *Ellis & Morton v. O. L. & T. Co.* 628.
6. A well-settled exception to this rule occurs, when the payment is made by the drawee of a forged bill or check, to a holder for value and without fault, and the money can not be returned without prejudice to him. *Ib.*
7. The exception rests upon the supposed knowledge of the drawee of the drawer's signature, and the negligence imputed to him for paying the paper, without sufficient inquiry as to its genuineness. *Ib.*
8. But this exception does not apply, when, either by express agreement, or a settled course of business between the parties, or by a general custom in the place, and applicable to the business in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud; and by his negligent failure to perform it, has contributed to induce the payee to act upon the paper as genuine, and to advance the money upon it. *Ib.*
9. Nor does it apply, in any case, where the parties are in a mutual fault, or where the money is paid upon a mistake of facts, in respect to which both were bound to inquire. *Ib.*
10. In a case of money paid upon a forgery, not falling within the exception, and governed by the general rule, it is sufficient to give notice when the forgery is discovered. *Ib.*
11. See **EJECTMENT**, 1; **EXECUTORS AND ADMINISTRATORS**, 3; **RECOUPMENT**, 1; **RAILROAD**, 10; **WIDOW**, 1, 2, 3.

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ADJOURNMENT—

1. Courts are not limited to a power of adjournment from day to day. They have an inherent power to adjourn to a more distant day, when not re- (625)

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strained by the constitution or statute law; and there is no such restraint on the common pleas courts of Ohio. When this power is exercised, the sitting after the adjournment is a prolongation of the regular term, and, in contemplation of law, there is but one term. But the "additional term," provided by section 5, act of January 31, 1854 (52 Ohio L. 10), is a distinct term, and not a prolongation of a regular term. *Harris v. Gest*, 472.

2. When the journal entries leave it doubtful whether it was intended to appoint an "additional term" under said section, or merely to adjourn the regular term to a distant day, the former construction ought to be preferred; since adjournments to a distant day are, in general, highly impolitic, and ought not, except for very weighty and special reasons, to take place. *Ib.*

3. See **APPEAL BOND**, 1.

ADMINISTRATION. See **EXECUTORS AND ADMINISTRATORS**.

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AGREEMENT—

1. Agreement to pay \$1,500 in wool, at 20 cents per pound, may be discharged by the payment of \$1,500 in money. *Trowbridge v. Holcomb*, 38.
2. See **MORTGAGE**, 1.
3. It is only by force of an agreement of the parties, that the giving of an unsealed note by the debtor will be payment of a precedent debt. The burden of proof is upon the debtor, who must establish the agreement clearly. *Merrick v. Boury*, 60.
4. See **DEED**, 1, 2, 3; **MORTGAGE**, 12.

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APPEAL BOND—

1. An appeal bond executed more than thirty days after the regular term at which judgment was rendered, but within thirty days after an "additional term" held under act of January 31, 1854 (52 Ohio L. 10), is not within the time required by law. (See **ADJOURNMENT**, 1, 2.) *Harris v. Gest*, 472.
2. Under the act regulating appeals to the district court (Swan's Stat. 717), one of two or more defendants, against whom, *jointly*, a judgment has been rendered in the common pleas, may appeal the case to the district court, and his appeal will vacate the judgment—its lien, however, being preserved—and take up the whole case. To perfect the appeal in such case, it is not necessary for the appellant to give a bond that will cover the defaults of his co-defendant. *Ewers v. Rutledge*, 210.

APPROPRIATION. See **PROPERTY**.

ASSIGNMENT—

N., indebted beyond the value of all his property, agreed in writing with four of his creditors, to execute a mortgage to one of them, who agreed to sign notes as surety to the others, on certain real estate, for security of all the claims; and, at the same time, delivered to the agent of the creditors, certain title-papers to the property agreed to be mortgaged. N. afterward refusing to perform, made general assignment for the benefit of all his creditors. *Held*:

1. The agreement created no lien on the land in favor of the creditors with

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- whom it was made, as against other creditors, deriving an interest under the assignment. *Bloom v. Noggle*, 45.
2. A creditor of an insolvent, or one having assumed liabilities for him as surety, may take from him a mortgage to secure such debt, or be indemnified against such liability; and as the reward of diligence, will be protected in his priority. *Ib.*
 3. But if he attempt to extend the lien beyond the necessity of his own indemnity, and secure the debt of any other creditor, the mortgage will be, in substance and legal effect, an assignment within the act of 1838; and the mortgagee being a trustee for such other creditor, under that act, will become trustee for all the creditors. *Ib.*
 4. The act can not be evaded by assuming a liability as surety for the insolvent debtor, as a part of the transaction by which the mortgage is taken. If in this case, therefore, the mortgage had been executed, or should be now decreed, the security would inure to the benefit of all the creditors of the mortgagor. *Ib.*
 5. L., an insolvent debtor, and in contemplation of such insolvency, made a conveyance by mortgage to three persons, conditioned to be void, if he should save them harmless upon certain indorsements made by them for his benefit "to divers persons;" and should also pay to certain others of his creditors named, "the several sums of money owing by him to them." *Held:*
 6. That such conveyance is, in substance and legal effect, an assignment within the purview of the act of 1838, relating to assignments by insolvent debtors to trustees, with the design to prefer one or more creditors, to the exclusion of others; and by force of that act, is made to inure to the benefit of all the creditors, in proportion to their respective demands. *Harkrader v. Leiby*, 602.
 7. The act does not affect the mortgage given by an insolvent debtor, to secure the debt of one of his creditors, or to indemnify him against a liability by indorsement or otherwise, assumed for the benefit of the debtor; although it may have the effect to prefer such creditor, and deprive others of the ability to obtain satisfaction of their claims. *Ib.*
 8. To bring a case within the operation of the law, there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor, other than himself. *Ib.*
 9. An assignment by way of mortgage may effect such transfer; and in such case, the mortgagee becomes a trustee for such creditor or creditors, and liable to account to him, or them, for the interest so received. *Ib.*
 10. Where such interest is received by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it inure to the benefit of *all* his creditors, and distributes the fund to all, in proportion to their respective demands. *Ib.*
 11. If the assignee, in such case, is made by the terms of the instrument, or by necessary implication, a *trustee* for any one or more of the creditors, he becomes of necessity, by force of the statute, a trustee for all, and in respect to all the property transferred by it. *Ib.*
 12. As therefore, the mortgagees in this case were made trustees for the other creditors named, the law has made them trustees for all the creditors of the mortgagor. *Ib.*

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BAR—

1. A decree in chancery may be as effectual a bar to an action, or defense at law, as would be a judgment at law. *Loudenback v. Collins*, 251.
2. But to make the dismissal of a bill a bar, it must have been upon the merits of the case, and not merely for want of prosecution. *Ib.*
3. When there will, and when there will not be a presumption of such dismissal, see EVIDENCE, 3, 4.
4. Where it appears that a dismissal was upon the hearing of a case, it is to be inferred that it was upon the merits. *Loudenback v. Collins*, 251.
5. Where a general demurrer to a declaration is sustained, and thereupon leave to amend the declaration is given, but the plaintiff subsequently, instead of amending, discontinues the action, there is no judgment that bars another suit upon the same cause of action. *McGatrick v. Wason*, 566.
6. Proceedings for a trial of right of property, resulting in an order of restitution and a return of the property pursuant to the order, are no bar to an action by the claimant against the officer, to recover damages for the seizure and detention of the property. *Abbey v. Searls*, 598.
7. If a defendant elect to present his claim for damages under the law of *recoupment*, a decision for or against him is a bar to another action. (See RECOUPMENT, 1, 2, 3, 4.) *Timmons v. Dunn*, 680.
8. The owner of land regularly appropriated to the use of a railroad company, in proceedings instituted by the company under laws providing therefor, is barred of the common-law remedy. *Hueston v. Eaton and Ham. Railroad Co.* 685.
9. In such case, the bar is equally effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him and deposited for his use. *Ib.*
10. See FORCIBLE ENTRY AND DETAINER, 2.

BARON AND FEME. See HUSBAND AND WIFE.

BASTARD—

H. C. P. died in 1852, intestate, unmarried, and without issue. He was a bastard—and survived his mother, who left other children—the fruit of a marriage contracted after the birth of the illegitimate. The children last named survived H. C. P. The act of 1853, “regulating descents and the distribution of personal estates,” was passed while the estate of H. C. P. was in course of settlement, and before distribution. *Held*, that whatever might be the rule under the operation of the act of 1831, had the settlement and distribution been made before the passage of the act of 1853, the last named enactment operated upon the distribution of the estate, prevented the escheat to the state, and entitled the surviving children of the bastard’s mother to his estate. *Lewis v. Eutsler*, 354.

BASTARDY—

1. The mother of a bastard child, after the reputed father has been recognized by a justice of the peace, on a complaint instituted by her, under the act for the maintenance and support of illegitimate children, has no power to settle for or release his liability. *Perkins v. Mobley*, 668.
2. The liability of the father is created by the statute, and designed for the security of the public against the support of the child, by compelling him to make the necessary provision therefor; and can only be settled by the mother, while the complaint is pending before the justice, and upon giving security to the township in which she resides against all liability for such support. *Ib.*
3. See EVIDENCE, 19.

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BOND. See APPEAL BOND, 1, 2; ACTION, 3.

CARRIER, COMMON—

1. A ferryman, occupying a position in a line of public travel, and holding himself out for general employment, is a common carrier. *Wilson v. Hamilton*, 722.
2. A common carrier, by special contract with the owner of goods intrusted to him, may so far restrict his common-law liability, as to exonerate himself from losses arising from causes over which he had no control, and to which his own fault or negligence in no way contributed. *Graham & Co. v. Davis & Co.* 362.
3. But he can not, by such stipulation, relieve himself from responsibility for losses caused by his own negligence, or want of care and skill. *Ib.*
4. His responsibility for the safe delivery of living animals transported by him, is the same as that in relation to the carriage of other property. *Wilson v. Hamilton*, 722.
5. It is the duty of the owner, delivering property to a carrier, which he knows requires peculiar care in its safe transportation, to make known the necessity, in order that the proper precaution may be used. *Ib.*
6. If the owner takes upon himself the care of his property while in transit, and it is lost by his carelessness, the carrier is not responsible. *Ib.*
7. But this rule only requires the owner to exercise care and diligence. That everything was not done that skill or prudence could have suggested, is no bar to a recovery. *Ib.*
8. A loss by negligence, however slight, is not within the exception which the carrier may, by bill of lading, make of the dangers of the river navigation and inevitable accidents; and the carrier is liable. *Graham & Co. v. Davis & Co.* 362.

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5. *Stansell v. Roberts*, 13 Ohio, 148. *Ib.*
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14. *McComb v. Akron*, 15 Ohio, 474. *Ib.*
15. *Akron v. McComb*, 18 Ohio, 229. *Ib.*
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26. Stemble v. Hewling, 2 Ohio St. 228. *Ib.* 176.
27. Willyard v. Hamilton, 7 Ohio (pt. 2), 111. *Ib.* 176; Hueston v. Ham. & Eaton R. R. Co. 689.
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29. 1 Ohio St. 95. Lamb v. Lane, 178.
30. Vattier v. Lytle's Ex'r, 6 Ohio, 477. Hollister v. Dillon, 204.
31. Hocking Valley Bank v. Walters, 1 Ohio St. 201. Ewers v. Rutledge, 213.
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33. Emerick v. Armstrong, 1 Ohio, 516. *Ib.*
34. Canby's Lessee v. Porter, 12 Ohio, 80. Thompson's Lessee v. Green, 222.
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CONSTITUTION OF OHIO. See **CONSTITUTIONAL LAW**.

CONSTITUTIONAL LAW—

1. The statutory provisions authorizing township roads, do not contravene the constitutional provision, that "private property shall ever be held inviolate, but subservient to the public welfare." Art. 1, sec. 19, Const. *Shaver v. Starrett*, 494.

2. See **ROADS**, 2.

3. See **JURY**, 1, 3, 4.

4. See **PROPERTY**, 1 to 17.

5. See **COURTS**, 1, 2.

CONSTABLE. See **OFFICER**, 1, 2.

CONTRACTS—

1. An antenuptial contract entered into in Germany, according to the laws of that country, by which the husband, for a valuable consideration, agreed that all the property of the intended wife, which she then owned or which they might mutually acquire during coverture, should be the property of the wife, is not contrary to the policy of our laws, and will be enforced in this country. *Scheferling v. Huffman*, 241.

2. A common carrier, by special contract with the owner of goods intrusted to him may so far restrict his common-law liability, as to exonerate himself from losses arising from causes over which he had no control, and to which his own fault or negligence in no way contributed. *Graham v. Davis*, 362.

3. But he can not, by such stipulation, relieve himself from responsibility for losses caused by his own negligence, or want of care and skill. *Ib.*

4. When a chattel mortgage, purporting to create a lien on the stock in a grocery, and also on such as should be subsequently acquired by the mortgagor, authorizes the mortgagee to take possession of the property secured and attempted to be secured, it is a continuing executory contract. And when the mortgagor acquires such property after the execution of the mortgage, and actually delivers the same to the mortgagee, the latter thereby acquires a valid lien on the subsequently acquired property. *Chapmann v. Weimer*, 481.

5. See **CARRIER**, 4, 5, 6, 7; **RAILROAD**, 1.

Conveyance—Court.

CONVEYANCE. See DEED, 1, 2, 3.

CONVEYANCES IN FRAUD OF CREDITORS. See ASSIGNMENT.

CORPORATIONS—

1. Municipal corporations are liable for injuries to third persons, resulting from the negligence of subordinate officers or agents acting under their authority and direction, in the construction of public improvements belonging to such corporations. *Dayton v. Pease*, 80.
2. In such cases, the maxim *respondet superior* properly applies, in the same manner and to the same extent as in its application to the liabilities of private individuals. *Ib.*
3. But where such agent or officer, although appointed by the corporation, performs duties for or between individuals, in which the corporation has no interest, no such liability arises, and the officer alone is responsible. *Ib.*
4. A city council, in passing an ordinance to appropriate land for a street, does not act judicially; nor is the assessment of damages by the committee appointed for that purpose, a judicial act. *McMicken v. Cincinnati*, 394.

See RAILROAD; RESPONDEAT SUPERIOR.

COSTS—

To authorize a judgment for costs against a prosecuting witness, under the provisions of section 45 of the probate court code, the person accused must have been acquitted, either by the probate judge, or by a jury of twelve men. *Sovereign v. State*, 489.

COURT—

1. The judges of the courts of common pleas are judges of their respective districts, and not of the mere subdivisions thereof. The subdivision of the districts is for election purposes merely. *Const.*, art. 4, sec. 3. *Harris v. Gest*, 372.
2. The district and Supreme Courts are capable of receiving jurisdiction to review cases decided by themselves. *Longworth v. Sturges & Anderson*, 690.
3. Such jurisdiction, in chancery cases, is conferred on the Supreme Court, by the law authorizing the reservation of a cause. *Ib.*
4. It is also conferred by the act of March 14, 1853. *Sec. 6, Ohio L.* 474.
5. The courts of probate in this state, by section 2 of the act of March 14, 1853, defining their jurisdiction and regulating their practice, were invested with power, upon final settlement with the administrator of an intestate estate, to order distribution of the money remaining in his hands, to the persons entitled thereto. *McLaughlin v. McLaughlin*, 508.
6. Where two of the judges of the court of common pleas are interested in the event of a proceeding to appropriate land to railroad use, and that fact appears in the record, and there is no evidence that the landholder waived his objection to the court, the order appointing appraisers and directing a warrant, will be reversed. *Gregory v. C. C. & C. Railroad Co.* 675.
7. A resided in Clinton county, and B in Ross county. They are sued as joint contractors, the summons issuing from the proper court of Clinton county, and each being served in his county. It is adjudged that A is not liable as a joint contractor. The plaintiff can not recover against B, on amendment striking out A. *Dunn v. Hazlett*, 435.
8. In such case, the person residing in and the person residing out of the county, can be required to answer where suit is brought, on the ground only that a joint contractor resides, and is sued, in the county of the forum chosen. *Ib.*
9. The findings of a court, when substituted for a jury, are entitled to the same consideration as the verdict of the latter; and it is well settled that a verdict will not be set aside, upon the ground of an erroneous finding, unless it is clear that such is the case. *Merrick v. Boury*, 60.
10. There is nothing in the constitution forbidding the holding of common pleas courts, in different counties of a subdivision, at the same time. *Harris v. Gest*, 472.

Coverture—Deed.

Court—Continued.

11. Courts are not limited in their power of adjournment, to an adjournment from one day to the succeeding day. They have an inherent power to adjourn to a more distant day, when not restrained by the constitution or statute law; and there is no such restraint upon the common pleas courts in Ohio. 6 Wheat. 106. When this power is exercised, the sitting after the adjournment is a prolongation of the regular term, and, in contemplation of law, there is but one term. 6 Wheaton, *supra*. But the "additional term," provided for by section 5 of the act of January 31, 1854 (52 Ohio L. 10), is a distinct term, and not a prolongation of a regular term. *Ib.* 473.
12. When the journal entries leave it doubtful whether it was intended to appoint an "additional term," under said section, or merely to adjourn the regular term to a distant day, the former construction ought to be preferred; since adjournments to a distant day are, in general, highly impolitic, and ought not, except for very weighty and special reasons, to take place. In this case, the limitation upon the business to be transacted at the July sitting, contained in the order appointing that sitting, shows that a distinct term, under the statute, was intended. *Ib.*
13. See JURISDICTION, 1; FORCIBLE ENTRY AND DETAINER, 1, 2; POSTMASTER, 1, 2, 3; JUSTICE OF THE PEACE, 2.

COVERTURE. See EJECTMENT, 1 to 6.

CRIMINAL PROSECUTION. See COSTS, 1.

CROP, GROWING. See LEASE, 1; EVIDENCE, 9.

CURTESY. See EJECTMENT, 1 to 6.

DAMAGES—

1. The measure of damages for the violation of an agreement to pay \$1,500 in wool, at 20 cents per pound, is fifteen hundred dollars, and not the market value of the wool. *Trowbridge v. Holcomb*, 38.
2. The true rule of damages in an action on the case, brought by a reversioner on account of an injury done to the premises, is the amount of the injury done to the estate in reversion. *Dutro v. Wilson*, 101.
3. See PROPERTY, 19; CORPORATION, 4; EVIDENCE, 23; RECOUPMENT, 1, 2, 3, 4.

DEATH. See WIDOW, 1, 2.

DEBTOR AND CREDITOR. See PARTNERSHIP, 4, 5; ASSIGNMENT; EVIDENCE, 7; PROMISSORY NOTES, 4.

DECREE. See BAR, 1, 2, 3, 4

DEED—

1. Where A is entitled to a conveyance of land from B, and A has agreed to convey the same land to C, upon the performance, on the part of C, of certain conditions, and it is agreed between A and C that the deed shall be executed by B to C, and deposited with a third person, to be delivered to C upon his performance of the conditions of sale; and the deed is accordingly executed and left with such third person, who afterward delivers the deed to C without the performance of such condition, no title passes to C by such delivery. *Ogden v. Ogden*, 182.
2. Where the condition upon which the deed was to be delivered was, in substance, among other things, that C was to execute a mortgage upon the premises to be conveyed, to secure the payment of money for A to a third person, and a bill is filed by A for a specific performance of the agreement, a court of equity will compel the execution of the mortgage; or, if the money thus secured to be paid is due, will decree the same a lien upon the land, and direct a sale of the interest of A and C in the land, to pay the amount which was to be secured by the mortgage. *Ib.*
3. Where C, after procuring the deed out of the hands of the person who held the same as an escrow, by unfair means, makes a mortgage on the same to a stranger, such stranger acquires no lien on the land which can be prior to

Delivery—Diligence.

DEED—Continued.

- the lien for the money which C was, by mortgage, to secure to A before he was entitled to the possession of the deed. *Ib.*
4. Where the state authorizes an agent to sell at public auction her public land, and to issue a certificate to the purchaser at such sale, and such agent is also authorized, after the time of sale by public auction, to sell at private sale any of the unsold lands, and the agent does sell at the public auction a lot of said land to A, who pays for the same and obtains a proper certificate, and the agent afterward sells the same lot at private sale to another person, the second sale is void. *Roseberry v. Hollister*, 297.
 5. In such case, if the governor make a deed to the last purchaser, and afterward, under a subsequent law, makes a deed to the first purchaser, the last deed will hold the land, although the last purchaser had no notice of the first purchaser's equity. *Ib.*
 6. A deed calling for an alley at 70 feet, more or less, from a street, does not estop the grantee to deny the existence of an alley at the distance of 60 feet. *Satchell v. Doran*, 542.
 7. See **ASSIGNMENT**, 1, 2, 3, 4; **MORTGAGE**; **LEASE**, 1; **EVIDENCE**, 10.

DELIVERY. See **DEED**, 1, 2, 3.

DEMAND. See **GUARANTY**.

DEMISE. See **EJECTMENT**, 1 to 6; **HUSBAND AND WIFE**, 6.

DEPOT—

The general assembly may, constitutionally, confer on a railroad corporation the right to appropriate ground for a depot. *Giesy v. C. & Z. Railroad Co.* 308.

DESCENT—

H. C. P. died in 1852, intestate, unmarried, and without issue. He was a bastard, and survived his mother, who left other children, the fruit of a marriage contracted after the birth of the illegitimate. The children last named survived H. C. P. The act of 1853, "regulating descents and the distribution of personal estates," was passed while the estate of H. C. P. was in course of settlement and before distribution. *Held*, that whatever might be the rule under the operation of the act of 1831, had the settlement and distribution been made before the passage of the act of 1853, the last-named enactment operated upon the distribution of the estate, prevented the escheat to the state, and entitled the surviving children of the bastard's mother to his estate. *Lewis v. Eutsler*, 354.

DESCRIPTION—

Whether the description of the debts and liabilities referred to in the following condition of a mortgage, is not too vague and uncertain to sustain it as a valid lien, if no other objection existed—*quere*. The condition is: "Provided, nevertheless, and this deed is on this condition, to wit: Whereas, the said G. L., Jacob L., and Jos. L. are indorsers and security for the said D. L., in divers sums of money and debts, due and to become due from said Daniel Leiby to divers persons. Now, if the said Daniel Leiby, his heirs or assigns, shall well and truly pay, or cause to be paid, the said debts and sums of money as aforesaid, amounting to about the sum of seven thousand dollars, and shall also pay to Dr. Wampler, John Shafer, Samuel Lucas, Isaac Gardner, and Aaron Russell, all of Butler county, Ohio, the several sums of money owing by the said Daniel Leiby to them, then these presents shall be void and of no effect; otherwise to be and remain in full force and virtue in law and equity." *Harkrader v. Leiby*, 602.

DEVISE. See **WILL**, 5 to 12.

DEVISEE. See **WILL**, 5 to 12.

DILIGENCE. See **ASSIGNMENT**, 2, 3, 4; **NEW TRIAL**, 5, 6, 7; **GUARANTY**.

Discharge—Equity.

DISCHARGE. See AGREEMENT, 1.

DISSOLUTION. See PARTNERSHIP, 4, 5.

DISTRIBUTION. See PROBATE COURT, 4.

DONATION TRACT. See SCHOOL LANDS, 1 to 5.

EJECTION—

1. An action of ejectment, on the demise of husband and wife, to recover possession of the wife's lands, is barred by an adverse occupancy of the lands for more than twenty-one years before the commencement of the suit. *Thompson's Lessee v. Green's Heirs*, 216.
2. *S. P., Ford's Lessee v. Langel*, 464.
3. The husband having a freehold in the lands, with the present right of exclusive enjoyment, and the wife or her heirs only the reversion, the former has the only right of entry. *Thompson's Lessee v. Green's Heirs*, 216.
4. If the exclusive right of possession, which before belonged to the husband, be lost by him through the adverse possession of a third person, the wife's right of entry, which, before, was postponed to the termination of the coverture, can not now accrue at an earlier period; and until it does accrue, no action of ejectment can be maintained, predicated upon her interest in the land. *Ib.*
5. The whole object and purpose of the statute of limitations are accomplished, when it is made to save to the wife such rights as she has in the lands; and when it gives her, at all times, remedies adapted to the redress of any injury she may sustain. *Ib.*
6. This is done by affording her, while her estate is in reversion, reversionary remedies, and, when her right of entry arises, the possessory remedy by ejectment. *Ib.*
7. The grantee or heir of one protected from the operation of the statutory bar, is entitled to the full benefit of that protection, and may bring a suit within the same time, and to the same effect, as though no change of ownership had occurred, and the suit was prosecuted in the name and for the benefit of the original owner. *Ford's Lessee v. Langel*, 464.
8. Where, in an action of ejectment to recover "the old penitentiary lot," in Columbus, E. N. S., the nature of whose possession does not appear in the record, was made defendant, entering into the common-consent rule, and the then attorney-general signed a plea of not guilty; the record showed that, at a subsequent term, E. N. S. being called, came not nor further defended; that (a successor of the attorney-general who filed the plea having been appointed and qualified) "the attorney-general of the State of Ohio being also called, appeared, and declined further to defend the action;" and that "neither party requiring a jury," the court found E. N. S. guilty, and gave judgment for the plaintiff. *Held*, the issue made by the plea of "not guilty," could not be tried by the court. There was no waiver by the parties of a trial by jury. *Slocum v. Swan's Lessee*, 161.

ELECTION. See INDICTMENT, 1.

EQUITY—

1. On bill in chancery filed by next friend of a married woman, a creditor of the husband will be enjoined from selling on execution, property in Ohio held by the wife, under the provisions of an antenuptial contract, made in Germany, according to the laws of that country, by which the husband, for a valuable consideration, agreed that all the property of the intended wife, which she then owned, or which they might mutually acquire during coverture, should be the property of the wife. *Scheferling v. Huffman*, 241.
2. Where the condition of the delivery of a deed held as an escrow is, that C is to execute a mortgage upon the premises to be conveyed, to secure the payment of money from A to a third person, and a bill is filed by A for a specific performance of the agreement, equity will compel the mortgage, or if the money thus to be secured is due, will make the same a lien, and direct a sale of the land to pay the amount. *Ogden v. Ogden*, 182.

Error.

Equity—Continued.

3. Whether a court of equity has, or has not, the power to vacate the satisfaction of a judgment, and open it for further process, because the purchaser, under a mistake, bid off property to which the debtor had no title, it will not permit such a sale to prejudice a party, in a case over which it has unquestioned jurisdiction. *Hollister v. Dillon*, 197.
4. The mortgage gave such jurisdiction in this case; and nothing short of an actual satisfaction would operate to deprive the mortgagee of his estate in the property, or bar a suit to recover the money secured by the mortgage. *Ib.*
5. A decree in chancery may be as effectual a bar to an action, or defense, at law, as would be a judgment at law. *Loudenback v. Collins*, 251.
6. But to make the dismissal of a bill a bar, it must have been upon the merits of the case, and not merely for want of prosecution. *Ib.*
7. A lien on property, subject to levy on execution, was not obtained by filing a bill under the act of February 25, 1848, amendatory of the chancery practice act of 1831 (46 Ohio L. 96); therefore, such property, when not in the hands of a receiver, might be taken on the executions of third persons, notwithstanding the pendency of such a bill. *Bowry v. Odell*, 623.
8. The pendency of an action at law was indispensable to authorize the filing of such a bill. *Ib.*
9. The district and Supreme Courts are capable of receiving jurisdiction to review cases decided by themselves. *Longworth v. Sturges & Anderson*, 690.
10. Such jurisdiction, in chancery cases, is conferred on the district court, by the law authorizing appeals, and on the Supreme Court, by the law authorizing the reservation of a cause. *Ib.*
11. It is also conferred by the act of March 14, 1853. Sec. 6, 51 Ohio L. 474. *Ib.*
12. A bill of review is not an original bill or suit. *Ib.*
13. The administrator of a vendee of real estate, in good faith, and when it might reasonably be considered for the interest of the heirs of the vendee to do so, rescind an executory contract with the vendor. After the lapse of many years, a court of equity will not, on the application of the heirs, disturb the contract of rescission. *Ludlow's Heirs v. Devisees of Cooper*, 1.
14. See ASSIGNMENT.

ERROR—

1. A correct judgment will not be reversed, because a bad reason for it was given by the court that rendered it. *Loudenback v. Collins*, 251.
2. A judgment will not be reversed, because an erroneous instruction was given to the jury, unless the record discloses some evidence tending to show that the instruction was material. *Ib.*
3. The question whether an instruction was correct or not, may become immaterial, owing to the finding of the jury. *Ib.*
4. A court of common pleas overruled an application for an assessment of rents and damages, in a case in which the justice's judgment had not been affirmed. The order overruling the application was reversed by the late Supreme Court upon the circuit, and a procedendo awarded. The common pleas then caused the assessment to be made, and gave judgment for it. *Held*, that the decision of the Supreme Court was no bar to a writ of error to reverse said judgment. *Aubrey v. Almy*, 524. (See FORCIBLE ENTRY AND DETAINER.)
5. Whether a court errs or not, in a charge to a jury, is immaterial, where there is no evidence tending to make the charge material, and it could not have misled the jury. *Satchell v. Doram*, 543.
6. A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter; that would be, in effect, to abolish the institution of juries, and substitute the court, to try all questions of fact. It must be clear that the jury has erred before a new

Evidence.

ERROR—Continued.

trial will be granted, on the ground that the verdict is against the weight of evidence, or unsupported by it. And if this is the rule, as it undoubtedly is, even in the court where a cause is tried, and before whom the witnesses appeared and testified, *a fortiori* ought it to be the rule, when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement. *McGatrick v. Wason*, 566.

7. A petition in error can not be sustained unless filed within three years after the rendition of the judgment sought to be reversed, except in a case of disability specified in section 523 of the code; and this is equally so in respect to judgments rendered before the code took effect, as in respect to those rendered afterward. *Schooner Marinda v. Dowlin*, 500.
8. A petition filed after the lapse of three years, when there was no such disability, will be stricken from the docket. *Ib.*
9. See **NEW TRIAL**; **EVIDENCE**, 5.

EVIDENCE—

1. Facts presumed are as effectually established as facts proved, so long as the presumption remains unrebutted. *Coombs & Ewing's Lessee v. Lane*, 112.
2. In respect to official acts, the law will presume all to have been rightfully done, unless the circumstances of the case overturn this presumption; and consequently acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter. *Ib.*
3. Where the question is, whether a bill was dismissed upon the merits, or for want of prosecution, and the ground of dismissal is not stated, nor anything found in the record from which it may be inferred, there is no presumption either way; the consequence of which is, that, as it must be established that the dismissal was upon the merits, and that fact is not shown and can not be presumed, there is no bar. *Loudenback v. Collins*, 251.
4. But where it appears that a dismissal was upon a *hearing* of the case, it is to be inferred that it was upon the merits. *Ib.*
5. On the trial of an information for selling spirituous liquors not inspected, the state is bound to give some evidence in support of the negative averment. *Cheadle v. State*, 471.
6. A record showing that the accused "did not demand a jury," sufficiently shows a waiver of the trial by jury. *Dailey v. State*, 57.
7. It is only by force of an agreement of the parties, that the giving of an unsealed note by the debtor will be payment of a precedent debt. The burden of proof is upon the debtor, who must establish the agreement clearly; and the question whether there was such an agreement, is one of fact to be determined by the jury. *Merrick v. Boury*, 60.
8. In an action against a carrier, upon a bill of lading containing an exception of the dangers of the river navigation and inevitable accidents, after the non-delivery of the goods is shown, the burden of proof is upon the carrier to show, not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it. *Graham v. Davis*, 362.
9. Where a lease for years is made of land, without any reservation in the lease itself of a growing crop, parol evidence may be introduced to show that the crop was growing on the land at the time when the lease was made, and was treated and considered as personalty, and not intended to be conveyed by the lease. In the sale of real estate in fee or for years, the growing crop may be considered by the parties as personal property, and so separated, in contemplation of law, as not to pass by the deed or lease. (*Baker v. Jordan*, 3 Ohio St. 438, followed and approved.) *Youmans v. Caldwell*, 71.
10. Where a special plea of a former trial between the same parties, upon the same point sought to be litigated, is pleaded, and where it becomes neces-

Evidence.

EVIDENCE—Continued.

- sary to introduce parol evidence to show that the two causes of action were the same, the identity of the causes of action in the two cases is a matter of fact for a jury, to be determined upon the evidence. *Ib.*
11. In an action against a postmaster, when the petition charges that a letter containing money was lost by the negligence of the postmaster, and the evidence introduced on the trial tends to prove that the letter containing the money reached the office of the postmaster, the plaintiff may prove, for the purpose of establishing the negligence, that the office was kept in an exposed situation, and that the servants and clerks of the postmaster, in a store in which the post-office was kept by the postmaster, had free access to the mail-matter in the office. *Ford v. Parker*, 576.
 12. Under a count framed on an executed consideration, and averring the original indebtedness and a subsequent promise in consideration thereof, but failing to aver that the claim had ever been barred by the statute of limitations, evidence will be admitted that the claim was barred, but taken out of the statute by a subsequent promise. *Haymaker v. Haymaker*, 272.
 13. An averment in a declaration, that the plaintiff was entitled to the use of a "public alley," is not supported by proof of a right to use a *private* alley. *Satchell v. Doran*, 542.
 14. In an action against an administrator for work and labor performed for the intestate, the widow of the intestate is a competent witness, at the common law, for the plaintiff, to prove the performance of such work and labor, where her testimony is not a disclosure of her husband's conversations or admissions; nor of matters the knowledge of which was acquired by her in conjugal confidence; nor of matters prejudicial to her husband's reputation. *Stober's Adm'r v. McCarter*, 513.
 15. In a proceeding to appropriate the land of a person for the use of a railroad company, the owner of the land proposed to be appropriated, is a competent witness to testify in his own behalf, provided the proceedings have been instituted since the code took effect. *Atlantic and Great Western Railroad Co. v. Campbell*, 583.
 16. In a suit brought by a surety against the manager and members of a firm, for which he had become bound as surety for a partnership debt, which suit was defended upon the ground that the manager had contracted the debt upon his own account alone, and not for the firm, and that the firm was not bound therefor, the manager, prior to the act to improve the law of evidence, was not a competent witness for the complainant, to establish the liability of the firm. *Hale v. Wetmore*, 600.
 17. For the same reasons (see p. 601), one of the partners, after the dissolution of the firm, was not a competent witness for the complainant in such suit, to establish the liability of a co-partner who had assumed the partnership debts. *Ib.*
 18. The provisions of the code do not apply to suits pending when it took effect. *Ib.*
 19. It is not competent to inquire of the general reputation of a witness sought to be impeached; but the inquiry must be confined to the reputation of the witness for truth and veracity. *Perkins v. Mobley*, 668.
 20. An entry, made by the register of a land office, in the "tract-book," that certain tracts are "school lands," is *prima facie* evidence that they were duly selected and approved as such. *Coombs & Ewing's Lessee v. Lane*, 112.
 21. Where such entry did not show for *what township* the tracts had been selected, but they had been taken possession of, and held, as its school lands, for over sixteen years, by the township in which they lie, and no claim had been made to them during all that period, either by the government or by any other township, or by any individual, and no other school lands had been selected for said township, and there was no evidence that any other

Examination of Witnesses—Executors and Administrators.

EVIDENCE—Continued.

- township was without school lands: *Held*, that it should be presumed that the lands had been selected for said township in which they lie. *Ib*.
22. No statute has authorized the recording of town-plats, not executed and acknowledged pursuant to statute, and consequently such record is not, *per se*, evidence. Nor is it made evidence by proof, that in building or improving, some lot-owners paid respect to the plat and others not. *Satchell v. Doram*, 542.
 23. As a general rule, the *opinion* of a witness as to the *amount of damages* which the landholder will sustain by reason of the construction and use of a railroad, is not evidence. *Atlantic and Great Western R. R. Co. v. Campbell*, 583.
 24. A party upon whom the affirmative of an issue devolves, is bound to give all his evidence in support of the issue, in the first instance; and he can only give such evidence, in reply, as tends to answer the new matter introduced by his adversary. *Graham v. Davis*, 362.
 25. Any relaxation of this rule is but an appeal to the sound discretion of the court in which the issue is tried, and can not be reviewed on error. *Ib*.
 26. In a proceeding on habeas corpus, instituted by the father of an infant child against the mother, who is living in a state of separation, to obtain its custody, it is error to reject evidence offered by him, either in the first instance, or by way of reply to evidence of qualification on her part, to show her unfitness to have the custody of the child. *Gishwiler v. Dodez*, 615.
 27. Where the testimony shows that the liquor was sold in the house of the defendant and at his bar, by his son, in the absence of the defendant, without any other evidence of the agency, it is error in a court to charge that such testimony makes a *prima facie* case of authority, from the defendant to the son, to do the illegal act. *Parker v. State*, 563.
 28. The courts of this state, in a proper case, have the power to take the evidence given by the plaintiff from the jury, and order a peremptory nonsuit. *Ellis & Morton v. O. L. & T. Co.* 628.
 29. Such a motion involves an admission of all the facts, which the evidence in any degree *tends* to prove, and presents only a question of law, whether each fact indispensable to the right of action, and put in issue by the pleadings, has been supported by some evidence. *Ib*.
 30. If it has, the motion must be denied; as no finding of facts by the court, or weighing of the evidence, is permitted. *Ib*.

EXAMINATION OF WITNESSES. See EVIDENCE, 24, 25, 26.

EXCEPTIONS, BILLS OF. See NEW TRIAL.

EXECUTION—

1. Property of a married woman, held by virtue of an antenuptial contract, entered into in Germany, according to the laws of that country, by which the intended husband, for a valuable consideration, agreed that all the property of the intended wife, which she then owned, or which they might mutually acquire during coverture, should be her property, can not be taken in execution in this country, to satisfy the debt of the husband. *Scheferling v. Huffman*, 241.
2. See HUSBAND AND WIFE, 3, 4, 5.

EXECUTORS AND ADMINISTRATORS—

1. Partners in the purchase of real estate having agreed that the estate purchased shall be considered personal property, a settlement of the partnership concerns by the administrator of one of the partners, deceased, and the surviving partner, by which the administrator relinquishes all claim to the real estate, binds the heirs of the deceased partner, especially if made before the surviving partner acquires the legal title to such real estate. *Ludlow's Heirs v. Cooper's Devises*, 1.
2. Where the administrator of a vendee of real estate, in good faith, and when

 Father—Fraudulent Conveyance.

EXECUTORS AND ADMINISTRATORS—Continued.

- it might reasonably be considered for the interest of the vendee's heirs to do so, rescinds an executory contract with the vendor, a court of equity will not, after the lapse of many years, disturb the contract of rescission on the application of the heirs. *Ib.*
3. In the absence of any express statutory provision on the subject, section 6 of the statute of limitation of 1831 is to be construed so as to cover a case under the administration act, where the claimant commences suit within six months after the rejection of his claim by the executor, and after the expiration of the six months the judgment is reversed, or the plaintiff becomes nonsuited. *Haymaker v. Haymaker*, 272.
 4. Probate courts, by section 2, act of March 15, 1853, were invested with power, on final settlement with administrators, to order distribution of the money remaining in administrator's hands. *McLaughlin v. McLaughlin*, 508.
 5. There exists no constitutional impediment to conferring such power upon that court. *Ib.*
 6. In the exercise of this jurisdiction, the court is authorized to determine every disputed question of fact (or, in its discretion, to cause the same to be determined by the verdict of a jury) which may be necessary to ascertain the amount justly due from the administrator to such distributees. *Ib.*
 7. Such an order of distribution has so far the force and effect of a judgment, that it may be enforced by execution. *Ib.*
 8. The powers of the court are exhausted when the order of distribution is made; and it has no jurisdiction to entertain a petition brought to enforce the collection of the amount awarded to the distributee, as a debt against the administrator. *Ib.*
 9. The death of a widow, to whom an allowance has been made under sections 45 and 46 of the administration law, before the expiration of the year, and before it has all been expended in her support, does not bar the right of her executor to recover the amount unpaid, from the executor of her husband. *Dorah v. Dorah's Ex'r*, 292.
 10. Whether, upon petition for such cause, the amount might be diminished by the probate court, under section 48—*quare?*

FATHER. See **PARENT AND CHILD**, 1, 2.

FERRYMAN—

1. A ferryman, occupying a position in a line of public travel, and holding himself out for general employment, is a common carrier. *Wilson v. Hamilton*, 722.
2. See **CARRIER, COMMON**, 1, 4, 5, 6, 7.

FINDING OF COURT. See **VERDICT**.

FORCIBLE ENTRY AND DETAINER—

1. Under the act of 1831, to regulate proceedings in forcible entry and detainer, the court of common pleas had no authority to cause an assessment of rents and damages to be made, by a jury or otherwise, and give judgment therefor, except in cases where the justice's judgments were affirmed. *Aubrey v. Almy*, 524.
2. A court of common pleas overruled an application for such an assessment, in a case in which the justice's judgment had not been affirmed. The order overruling the application was reversed by the late Supreme Court upon the circuit, and a procedendo awarded. The common pleas then caused the assessment to be made, and gave judgment for it. *Held*, that the decision of the Supreme Court was no bar to a writ of error to reverse said judgment. *Ib.*

FORMER RECOVERY. See **EVIDENCE**, 10; **PLEADING**, 4.

FORGERY. See **ACTION**, 5 to 10.

FRAUDULENT CONVEYANCE. See **ASSIGNMENT**.

Grand Jury—Husband and Wife.

GRAND JURY—

It is not essential that the record of a conviction of murder should set out and show expressly, that the grand jurors who returned the indictment, had the qualifications of electors. *Parks v. State*, 234.

GRANTOR AND GRANTEE. See EJECTMENT, 7; LIMITATION OF ACTION, 3.

GROWING CROP. See LEASE, 1; EVIDENCE, 9.

GUARANTY—

1. In case of guaranty, demand of payment of the principal debtor and notice of his default are requisite to charge the guarantor only where the fact on which his liability is made dependent rests peculiarly *within the knowledge* of the guarantee, or depends on *his option*. *Bashford v. Shaw*, 263.
2. But where the contingency which determines the liability of a guarantor, is one which is known to him, or which he is bound to know, or where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril. *Ib.*
3. In order to discharge a guarantor from liability, on the ground of want of notice of the default of the principal debtor, there must be, not only a want of the notice *within a reasonable time*, but there must be also some *actual loss or damage* thereby caused to the guarantor. And if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is not wholly discharged, but only *pro tanto*. *Ib.*
4. If his principal debtor be solvent when the note falls due, and due notice of the default be not given, and the principal afterward, and before notice, becomes insolvent, the guarantor is discharged. *Ib.*
5. The continued insolvency of the principal debtor, from the time of the maturity of the debt, as a general thing, dispenses with the necessity of the notice, in order to charge the guarantor. *Ib.*
6. Where the undertaking of the party is to guarantee the payment of the note of another, *after final process*, the prosecution of the claim to final process against the maker of the note is essential, in order to charge the guarantor. *Ib.*
7. But an omission to bring suit against the original debtor, within a reasonable time, will not discharge the guarantor from liability, where the terms of the guaranty do not prescribe the degree of diligence to be used in the proceeding, by suit, and where, in consequence of the continued insolvency of the principal debtor from the time of the maturity of the debt, the guarantor suffered no loss by the delay. *Ib.*

HABEAS CORPUS—

1. In a proceeding upon habeas corpus, instituted by the father of an infant child, against the mother, who is living in a state of separation, to obtain its custody, it is error to reject evidence offered by the father, either in the first instance, or by way of reply to evidence of qualification on her part, to show her unfitness to have the custody of the child. *Gishwiler v. Dodez*, 615.
2. In such a controversy for the custody of a child, incapable of electing for itself, the order of the court should be made with a single reference to its best interests. *Ib.*
3. Neither of the parents has any right that can be made to conflict with the welfare of the child. *Ib.*

HEIR. See EJECTMENT, 7; LIMITATION OF ACTION, 3; EXECUTORS AND ADMINISTRATORS, 1, 2; BASTARD.

HIGHWAYS. See ROADS, 1, 2.

HUSBAND AND WIFE—

1. In a controversy between parents on habeas corpus, for the custody of a child, incapable of electing for itself, the order of the court should be made with a single reference to its best interests. *Gishwiler v. Dodez*, 615.
2. Neither of the parents has any rights which can be made to conflict with the welfare of the child. *Ib.*

 Ignorance—Information.

HUSBAND AND WIFE—*Continued.*

3. An antenuptial contract entered into in Germany, according to the laws of that country, by which the husband, for a valuable consideration, agreed that all the property of the intended wife, which she then owned, or which they might mutually acquire during coverture, should be the property of the wife, is not contrary to the policy of our laws, and will be enforced in this country. *Scheferling v. Huffman*, 241.
4. Such property can not be taken on execution in this country, to satisfy the debt of the husband. *Ib.*
5. Upon a bill in chancery, filed by the wife, by her next friend, for the purpose of enjoining a creditor of the husband from selling such property on execution, the court will, by injunction, restrain such sale. *Ib.*
6. An action of ejectment, on the demise of husband and wife, to recover possession of the wife's lands, is barred by an adverse occupancy of the lands, for more than twenty-one years before the commencement of the suit. *Thompson's Lessee v. Green*, 216; *S. P., Ford's Lessee v. Langel*, 464.
7. In an action against an administrator for work and labor performed for the intestate, the widow of the intestate is a competent witness, at the common law, for the plaintiff, to prove the performance of such work and labor, where her testimony is not a disclosure of her husband's conversations or admissions; nor of matters the knowledge of which was acquired by her in conjugal confidence; nor of matters prejudicial to her husband's reputation. *Stober v. McCarter*, 513.

IGNORANCE. See MORTGAGE, 13, 14; SATISFACTION, 1, 2; ACTION, 5 to 10.

INDEMNITY—

1. It seems to be a well-settled principle, that the purchaser of an incumbered estate, if he agrees to take it subject to the incumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the incumbrance, whether he expressly promise to do so or not—a promise to that effect being implied from the nature of the transaction. *Thompson v. Thompson*, 333.
2. See PROMISSORY NOTES, 3; ASSIGNMENT—generally—particularly, 2, 3.

INDICTMENT—

1. On indictment, charging two or more offenses, arising out of distinct and different transactions, the prosecutor may be required to elect on which charge he will proceed; but the action of the court trying the cause in this respect, being a matter of discretion, can not be assigned for error. *Bailey v. State*, 440.
2. As a general rule, several distinct offenses may be joined in different counts, either where they arise out of, and are connected with, the same transaction, or where they are connected by the same subject-matter. *Ib.*
3. An indictment containing seven counts, and the verdict being not guilty on the sixth and seventh, and guilty on the first, second, third, fourth, and fifth counts, the finding is equivalent to a general verdict of guilty on the first five counts. *Ib.*
4. A verdict of guilty on several distinct counts, some of which are bad and some good, will support a proper judgment, warranted by the law applicable to the good counts. *Ib.*
5. A substantial averment of the intent to steal or rob, is essential to an indictment for robbery. *Matthews v. State*, 539.
6. It is not sufficiently made by the word "feloniously did seize, take, and carry away." *Ib.*
7. See GRAND JURY, 1; INFORMATION.

INFORMATION—

1. A complaint before a justice of the peace for a violation of section 4 *only* of the "liquor law," does not authorize an information, in the probate court, upon any other section. *Aultfather v. State*, 467.
2. An information upon section 4 of the act to provide against the evils re-

Injuries, Civil—Joinder of Parties.

INFORMATION—Continued.

- sulting from the sale of intoxicating liquors, is defective if it does not show that the place where the liquor was sold, was a place of public resort. This fact is sufficiently shown if the place is described as either a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, because each of these names is used in the act, and each of them does, *ex vi termini*, import a place of public resort. But it is otherwise if the place is merely called a "room;" for, although that word is also used in the act, it does not, *ex vi termini*, describe a place of public resort, and that it is so must be averred. *Ib.*
3. An information upon section 2 of the act is insufficient if it does not aver that the seller knew the buyer was a minor. *Ib.*
 4. An information founded upon section 1 of the act to prevent the adulteration of alcoholic liquors (Swan's Rev. Stat. 479a), must contain the general allegation that the liquors sold were not inspected. *Woodworth v. State*, 487.
 5. It is not sufficient to aver that they were not inspected in the county where sold, and that the cask containing them did not have the inspector's brand of any other county. *Ib.*
 6. An information charging the defendant with selling intoxicating liquors to A, a person who then and for a long time had been in the habit of getting intoxicated, which habit was then and there well known to the defendant, ought not to be quashed upon the ground that the affidavit, upon which the defendant was arrested, did not state that defendant knew A was in the habit of getting intoxicated. *Parker v. State*, 563.
 7. A count in an information charging B with selling intoxicating liquors, to be drank at the place where sold, will be sustained by proof that the liquor was sold by C, as the agent of B, and it is not necessary to aver in the information that it was sold by an agent. *Ib.*
 8. See **INDICTMENT**; **EVIDENCE**, 5, 27.

INJURIES, CIVIL. See **CORPORATIONS**, 1, 2, 3; **RESPONDEAT SUPERIOR**.

INSTRUCTION—

1. A judgment will not be reversed, because an erroneous instruction was given to the jury, unless the record discloses some evidence tending to show that the instruction was material. *Loudenback v. Collins*, 251.
2. The question whether an instruction was correct or not, may become immaterial, owing to the finding of the jury. *Ib.*

INSURANCE—

1. The appropriation of a part of the insured building to the trade of cooperating, in violation of the conditions and by-laws, annexed to and made a part of the policy (and which provide that such misappropriation shall, *ipso facto*, render the policy void), avoids the policy; and when it is shown that such forbidden trade was actually carried on, the breach of the conditions and by-laws is complete, although the trade was not carried on for such a length of time as to become "permanent or habitual." *Harris v. Columbian Mut. Ins. Co.* 285.
2. It seems that, where the condition of a policy renders it void if the building is appropriated or used for any trade, or for storing any goods denominated extra-hazardous, the carrying on such trade, temporarily, for the purpose of ordinary repairs, or the introduction into the building of the articles so denominated, to be used for ordinary repairs, or to be consumed in domestic or family use, does not avoid the policy, and the insurers are, notwithstanding, liable; and it is in these and the like cases that courts have said, that the trade or use, etc., is not "permanent or habitual." *Ib.*

INTOXICATING LIQUORS, ACT TO PROVIDE AGAINST SALES, ETC.

See **INFORMATION**; **EVIDENCE**, 5, 27.

JOINDER OF PARTIES—

1. Where two are sued as joint contractors, one of whom resides in the county

Judges—Jury.

JOINDER OF PARTIES—*Continued.*

- in which the suit is brought, and the other in another county, and service of a summons is made on each in the county in which he resides, and it turns out that the person residing in the county where the action is brought is not liable as a joint contractor, the plaintiff ought not to recover against the one residing in the foreign county. *Dunn v. Hazlett*, 435.
2. In such case, the person residing in and the person residing out of the county, jointly plead to the merits, and the court find that they were not joint contractors, and nonsuit the plaintiff, it is error in the court to set aside the nonsuit, with leave to the plaintiff to strike out the name of the person residing in the county, and proceed against the one residing out of the county alone. *Ib.*
 3. After such leave granted, it is error in the court to refuse to dismiss the proceedings, for the reason that no service of a summons was made within the county where suit was brought. *Ib.*

JUDGES—

Where two of the judges of the court of common pleas are interested in the event of a proceeding to appropriate land to the use of a railroad, and that fact appears on the record, and there is no evidence that the landholder waived his objection to the court, the order of such court, appointing appraisers and directing a warrant to issue, will be reversed. *Gregory v. C. C. & C. Railroad Co.* 675.

JUDICIAL ACT—

A city council, in passing an ordinance to appropriate land for a street, does not act judicially, nor is the assessment of damages by the committee, appointed for that purpose, a judicial act. *McMicken v. Cincinnati*, 394.

JURISDICTION—

1. Where a court has jurisdiction of a form of action, its jurisdiction, in a particular case brought in that form, is not ousted by the evidence showing that the action is misconceived, and that some other form of action should have been resorted to. It is simply good matter of defense. *Aubrey v. Almy*, 524.
2. See JOINDER OF PARTIES, 1, 2, 3; COURTS, 8; INFORMATION, 1; ERROR, 5, 6; PROBATE COURT, 4, 5, 6, 7, 8; POSTMASTERS, 1, 2; COURTS, 2, 3, 4; REVIEW, 1, 2, 3; JUSTICE OF THE PEACE, 2.

JURY—

1. Section 42 of an "act defining the jurisdiction and regulating the practice of probate courts," passed March 14, 1853, providing, that "upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the probate judge shall proceed to try the issue," is a valid and constitutional enactment. *Dailey v. State*, 57.
2. Where, in an action of ejectment to recover "the old penitentiary lot," in Columbus, E. N. S., the nature of whose possession does not appear in the record, was made defendant, entering into the common-consent rule, and the then attorney-general signed a plea of not guilty; the record showed that, at a subsequent term, E. N. S. being called, came not nor further defended; that (a successor of the attorney-general who filed the plea having been appointed and qualified) "the attorney-general of the State of Ohio being also called, appeared, and declined further to defend the action; and that neither party requiring a jury," the court found E. N. S. guilty, and gave judgment for the plaintiff. *Held*, the issue made by the plea of "not guilty," could not be tried by the court. There was no waiver by the parties of a trial by jury. *Slocum v. Swan's Lessee*, 161.
3. The provision in section 19 of article 1 of the constitution, that "such compensation shall be assessed by a jury, without deduction for the benefits to any property of the owner," applies to all the cases mentioned in the section. *Lamb v. Lane*, 167.
4. The "word" "jury" in that section, as well as in the other places in the con-

Jury Fee—Limitation of Actions.

JURY—Continued.

stitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties. And they may be sent to inspect the premises. *Id.*

6. Where a motion is made for a new trial in a criminal case, on the ground that one of the petit jurors had, previous to his being called on as a juror, expressed his opinion that the accused was guilty, although, when interrogated in the jury-box, before being sworn, he answered that he had neither formed nor expressed any opinion on the subject, it is essential that the motion should be supported by an affidavit, showing that the fact of such objection was *unknown*, either to the accused or his counsel, at the time the jury was impaneled. *Parks v. State*, 234.
6. See COURT, 9; NEW TRIAL, 1; COSTS, 1.

JURY FEE—

Section 92 of the justices' code (Swan's Stat. 514) does not make the payment of the jury fee a condition precedent to the rendition of judgment. If it be not paid, the justice may make an order that the successful party pay it, and enforce such order by an attachment; but he can not omit to give judgment because it is not paid. *Robinson v. Kious*, 593.

JUSTICE OF THE PEACE—

1. The sureties in the official bond of a justice of the peace, conditioned that the officer should well and truly pay over, according to law, all moneys that might come into his hands, by virtue of his commission, are liable, upon failure of the personal representative of the officer, after his death, to pay over, upon demand, moneys that came into his hands officially during his term of office. *Peabody v. State*, use, etc. 387.
2. Section 10 of the act regulating the jurisdiction of justices of the peace, which provides "that justices shall not have cognizance in actions against justices of the peace, or *other officers*, for misconduct in office," includes postmasters. *Ford v. Parker*, 576.

LAND. See PARTNERSHIP, 1; LEASE, 1; EJECTMENT.

LAW. See PROPERTY, 3.

LEASE—

1. Where a lease for years is made of land, without any reservation in the lease itself of a growing crop, parol evidence may be introduced to show that the crop was growing on the land at the time when the lease was made, and was treated and considered as personalty, and not intended to be conveyed by the lease. In the sale of real estate in fee or for years, the growing crops may be considered by the parties as personal property, and so separated, in contemplation of law, as not to pass by the deed or lease. (*Baker v. Jordan*, 3 Ohio St. 438, followed and approved.) *Youmans v. Caldwell*, 71.
2. See MECHANIC'S LIEN, 1.

LIEN. See ASSIGNMENT, 1; MORTGAGE, 1, 2, 3, 4, 5; MECHANIC'S LIEN, 1; DEED, 2, 3; MORTGAGE, 12; APPEAL; WILL, 5; MORTGAGE, 10, 11; EQUITY, 7.

LIMITATION OF ACTIONS—

1. Ejectment, on the demise of husband and wife, to recover possession of the wife's lands, is barred by an adverse occupancy of the lands for more than twenty-one years before the commencement of the suit. *Thompson's Lessee v. Green*, 216.
2. S. P., *Ford's Lessee v. Langel*, 464.
3. The grantee or heir of one protected from the operation of the statutory bar, is entitled to the full benefit of that protection, and may bring a suit within the same time, and to the same effect, as though no change of ownership had occurred, and the suit was prosecuted in the name and for the benefit of the original owner. *Id.*
4. In the absence of any express statutory provision on the subject, section 6

 Liquor Law—Mortgage.

LIMITATION OF ACTIONS—*Continued.*

of the statute of limitation of 1831, is to be construed so as to cover a case under the administration act, where the claimant commences suit within six months after the rejection of his claim by the executor, and after the expiration of the six months the judgment is reversed, or the plaintiff becomes nonsuited. *Haymaker v. Haymaker*, 272.

5. The fact that the nonsuit was occasioned by the failing of the plaintiff to give security for costs, does not withdraw the case from the operation of the statute, so construed. *Id.*

6. See PLEADING, 1, 2, 3.

LIQUOR LAW. See INFORMATION; EVIDENCE, 5, 27.

MANDAMUS—

The clerk of the court must not be expected to draft writs of mandamus. By the express provisions of the code, the writ and the answer thereto are pleadings, and the only pleadings in the case. The petition, or motion, upon which the writ issues, is no part of the pleadings. The writ must therefore be sufficient, *in itself*, to show precisely *what is claimed*, and the *facts upon which the claim is made*. To draft such a writ, generally requires time and legal skill, and also a knowledge of the case, which the clerk can not be required to obtain. Counsel must therefore prepare such writs, and submit them to the court, before they are issued, in order that it may be seen that they correspond with the order of allowance. *Johnes v. Auditor*, 493.

MARRIED WOMAN. See HUSBAND AND WIFE; EVIDENCE, 14.

MASTER AND SERVANT. See RESPONDEAT SUPERIOR.

MEASURE OF DAMAGES. See DAMAGES.

MECHANIC'S LIEN—

The word "owner," in section 1 of the mechanics' lien law, is not limited in its meaning to an owner of the fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is upon the fee; if it is a less estate, the lien is upon such smaller estate. *Dutro v. Wilson*, 101.

MISTAKE—

1. Money paid on mistake of facts, and without consideration, may, as a general rule, be recovered back. *Ellis & Morton v. Ohio L. Ins. & T. Co.* 528.
2. For exceptions to rule, see ACTION, 5, 6, 7, 8, 9, 10.
3. See PROMISSORY NOTES, 4; MORTGAGE, 13, 14; SATISFACTION, 1, 2; EQUITY, 3, 4.

MISDIRECTION. See INSTRUCTION.

MISJOINDER. See JOINDER OF PARTIES.

MORTGAGE—

1. Upon general equity principles, unaffected by statutory provisions, an agreement in writing, for a mortgage, is a valid contract, fixing a specific lien upon the property; and will be specifically enforced by a court of chancery against the party, and all subsequent purchasers from him with notice, as well as against any general assignment, either voluntary or by operation of law, for the benefit of his creditors. *Bloom v. Noggle*, 45.
2. As between the parties to such a contract, the agreement is valid and effectual in this state, and a specific performance may be enforced. *Id.*
3. But no effect whatever can be given to it, consistently with section 7 of the act of June 1, 1831, to provide for the proof, acknowledgment, and recording of deeds, etc., as against third persons, who have subsequently acquired the legal title to, or a lien at law upon, the property to which it relates. *Id.*
4. By the positive provisions of that section, as construed by the declaratory act of March 16, 1838, and repeated decisions of this court, as against such third persons, mortgages have no effect either at law or in equity, until delivered to the recorder of the proper county for record. *Id.*
5. The legal rights of such persons can not be displaced at the instance of

Mother—Negligence.

MORTGAGE—Continued.

- the holder of a prior, unrecorded mortgage, or contract for a mortgage, although acquired with notice of such mortgage, or of the existence of such contract; the object of the law being to avoid all the vexed questions of notice, actual or constructive, in determining priorities of lien. *Ib.*
6. The object of the statute requiring the record of mortgages, being notice to persons other than those who are parties to the instrument, a mortgage may be valid and binding as such without record, as between the parties to the instrument. *Sidle v. Maxwell*, 236.
 7. The execution of a mortgage is the act of a mortgagor, but the filing it for record is exclusively the act of the mortgagee, not requiring the assent of the former, and not in reality a part of the execution of the instrument. *Ib.*
 8. The language of the court, in the case of *Holiday v. The Franklin Bank of Columbus*, 16 Ohio, 533, declaring "that the delivery of a mortgage for record is a part of the execution of the instrument, and that, before the filing for record, a mortgage has no validity, either at law or in equity," must be received with the qualification, that it has exclusive reference to the effect of the instrument as to those not parties to it. *Ib.*
 9. Whether the description, copied in title DESCRIPTION of this index, is not too vague and uncertain to sustain it as a valid lien, if no other objection existed—*quære*. *Harkrader v. Crane*, 602.
 10. A chattel mortgage, purporting to create a lien on the stock in a grocery, and also on such as should be subsequently acquired by the mortgagor, creates no lien on the subsequently acquired property. *Chapman v. Weimer*, 481.
 11. When such mortgage authorizes the mortgagee to take possession of the property secured and attempted to be secured, it is a continuing executory contract; and when the mortgagor acquires such property after the execution of the mortgage, and actually delivers the same to the mortgagee, the latter thereby acquires a valid lien on such subsequently acquired property. *Ib.*
 12. Where the condition on which an escrow deed was to be delivered, was, that C was to execute a mortgage upon the premises to be conveyed, to secure the payment of money for A to a third person, and a bill is filed by A for a specific performance of the agreement, a court of equity will compel the execution of the mortgage; or, if the money thus secured to be paid is due, will decree the same a lien upon the land, and direct a sale of the interest of A and C in the land, to pay the amount which was to be secured by the mortgage. *Ogden v. Ogden*, 182.

MOTHER. See PARENT AND CHILD; HABEAS CORPUS; EVIDENCE, 26.

MUNICIPAL CORPORATIONS. See CORPORATIONS, 1, 2, 3.

MURDER. See GRAND JURORS.

NEGLIGENCE—

1. In an action to recover damages against a railroad company, for the destruction of horses which were on the track of the railroad when killed, evidence was given tending to prove an obligation resting upon the owner of the land, where the horses were pastured, to fence it from the railroad track; and that in consequence of the failure, the horses had strayed upon the track. The court charged the jury, in effect, that the company would be liable for the negligence of its officers and agents, as though the horses were running at large, or no such obligation existed. In this charge there was error. *C. H. & D. Railroad Co. v. Waterson & Kirk*, 424.
2. The company had the right to protect itself against the inconvenience and hazard of using an unfenced road. *Ib.*
3. After devolving the obligation to do this upon the owner of the land, he could not, over the breach of his contract, suffer his animals to go upon the road without being liable for their trespass. *Ib.*

New Trial—Office and Officers.

NEGLIGENCE—*Continued.*

4. In such case, he would be a wrong-doer, and not entitled to demand the same degree of care as though he did not occupy that position. *Ib.*
5. If the company had succeeded in establishing this fact, they could not have been charged short of proof of intentional injury, or of that gross carelessness, involving a recklessness of consequences, which it is so difficult to distinguish from intentional wrong. *Ib.*
6. The remote negligence of the plaintiff will not prevent his recovering for an injury done to his property, *immediately* caused by the negligence of the defendant. The negligence of a plaintiff that defeats a recovery, must be a *proximate* cause of the injury. *C. C. & C. Railroad Co. v. Elliot*, 476.
7. See RAILROAD, 1, 7, 8, 9; RESPONDEAT SUPERIOR; CORPORATIONS, 1, 2, 3, DAMAGES, 3; POSTMASTER.

NEW TRIAL—

1. The findings of a court, when substituted for a jury are entitled to the same consideration as the verdict of the latter; and it is well settled that a verdict will not be set aside, upon the ground of an erroneous finding, unless it is clear that such is the case. *Merrick v. Boury*, 60.
2. A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter; that would be, in effect, to abolish the institution of juries, and substitute the court, to try all questions of fact. It must be clear that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of evidence, or unsupported by it. And if this is the rule, as it undoubtedly is, even in the court where a cause is tried, and before whom the witnesses appeared and testified, *a fortiori* ought it to be the rule, when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement. *McGatrick v. Wason*, 567.
3. When a motion to the court, to set aside the finding of a jury, or the court, upon such issue, because the finding was against the evidence, is overruled, the bill of exceptions must show what was the evidence upon which said finding was founded; otherwise, a court of error can not determine whether the court below erred or not. It is not sufficient to say that *evidence* was given of such and such facts on the trial of the issue. *Youmans v. Caldwell*, 71.
4. *S. P., Eastman v. Wight*, 156.
5. Where a motion is made for a new trial in a criminal case, on the ground that one of the petit jurors had, previous to his being called on as a juror, expressed his opinion that the accused was guilty, although, when interrogated in the jury-box, before being sworn, he answered that he had neither formed nor expressed any opinion on the subject, it is essential that the motion should be supported by an affidavit, showing that the fact of such objection was *unknown*, either to the accused or his counsel, at the time the jury was impaneled. *Parks v. State*, 234.
6. See JURY, 6.

NONSUIT. See EVIDENCE, 28, 29, 30,

NOTICE. See PROMISSORY NOTES, 1; MORTGAGE, 3 to 8; GUARANTY DEED, 4, 5; WILL, 5, 6; ACTION, 5 to 10.

NUISANCE. See RESPONDEAT SUPERIOR, 5; RAILROAD, 1.

OFFICE AND OFFICERS—

1. A seizure of the goods of A, under color of process against B, is *official misconduct* in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. *State, use, etc. v. Jennings*, 418.

 Onus Probandi—Plat.

OFFICE AND OFFICERS—Continued.

2. For such breach, an action on the bond lies against the officer and his sureties. *Ib.*
3. See CORPORATIONS, 1, 2, 3; RESPONDEAT SUPERIOR, 1, 2, 3; EVIDENCE, 2, 21; TREASURER; POSTMASTER.

ONUS PROBANDI. See EVIDENCE, 5, 7, 8.**OPINION OF WITNESSES.** See EVIDENCE, 23.**OPPRESSION.** See OFFICE AND OFFICERS.**OWNER.** See MECHANIC'S LIEN.**PARENT AND CHILD—**

1. In a proceeding upon habeas corpus, instituted by the father of an infant child, against the mother who is living in a state of separation, to obtain its custody, it is error to reject evidence offered by the father, either in the first instance, or by way of reply to evidence of qualification on her part, to show her unfitness to have the custody of the child. *Gishwiler v. Dodez*, 615.
2. In such a controversy for the custody of a child, incapable of electing for itself, the order of the court should be made with a single reference to its best interests. *Ib.*
3. Neither of the parents has any right that can be made to conflict with the welfare of the child. *Ib.*

PAROL EVIDENCE. See LEASE, 1; PLEADING, 4.**PARTNERSHIP—**

1. A partnership may exist in the purchase and sale of real estate. *Ludlow's Heirs v. Cooper's Devises*, 1.
2. When the parties to such partnership agree that the real estate so purchased shall be considered personal property, it will be so considered and held in a court of equity. *Ib.*
3. In such case, a settlement of the partnership concerns by the administrator of the deceased partner and the surviving partner, by which the administrator of the deceased partner relinquishes all claim to the real estate, is binding on the heirs of the deceased partner, especially if made before the surviving partner acquires the legal title to such real estate. *Ib.*
4. S. & P., partners in trade, during the continuance of the partnership, became indebted to a third person for money borrowed, for which a promissory note was given in the name of the firm. After the dissolution of the partnership, and at the maturity of the note, S., in the name of the firm, executed a new note to the creditor, payable at a future day, with D. as surety, and which D. was ultimately compelled to pay. *Held*, that the dissolution of the partnership worked an absolute revocation of all implied authority in either of the partners to bind the other to new engagements, contracts, or promises, made to or with persons having notice of the dissolution; although springing out of, or founded upon, the indebtedness of the firm. *Palmer v. Dodge*, 21.
5. No such power could be inferred, from an authority given by one partner to the other, to settle, liquidate, and close up the affairs of the partnership. *Ib.*
6. Such liquidating partner had no power to extend the time for payment of the obligations of the firm, to increase their amount, or to obligate the firm to persons to whom it was not bound at the dissolution; and, therefore, that P. was not bound by the note given by S. after the dissolution, nor obligated to indemnify D. against the consequences of becoming security upon it. *Ib.*

PAYMENT. See EVIDENCE, 7; AGREEMENT, 1; MORTGAGE, 13, 14; SATISFACTION, 1, 2; BASTARDY.**PLAT.** See EVIDENCE, 22.

Pleading.

PLEADING—

1. Where the declaration contains several counts, the first of which avers the original contract-liability of the defendant's testator to the plaintiff, the bar by the statute of limitations and a subsequent promise to pay, within six years before the commencement of the action; the second of which avers, that in consideration of the work and labor of the plaintiff, previously done and performed by the testator—without averment that it was done at the request of the testator—the testator promised to pay the plaintiff what the work was reasonably worth: it is no error for the court to charge the jury that the plaintiff may recover under the second count, not for the labor, but upon the promise made in consideration of such labor. *Haymaker v. Haymaker*, 272.
2. There is no bar to an action unless pleaded, and it would be requiring too much to ask the plaintiff to foresee which defense will be made, and to anticipate the statute of limitations. The better practice in such case is to make the issue of the subsequent promise by replication. *Ib.*
3. Under a count, framed on an executed consideration, and averring the original indebtedness and a subsequent promise in consideration thereof, but failing to aver that the claim had ever been barred by the statute of limitations, evidence will be admitted that the claim was barred, but taken out of the statute by a subsequent promise. *Ib.*
4. Where a special plea of former trial between the same parties, upon the same point sought to be litigated, is pleaded, and where it becomes necessary to introduce parol evidence to show that the two causes of action were the same, the identity of the causes of action in the two cases is a matter of fact for a jury, to be determined upon the evidence. *Youmans v. Caldwell*, 71.
5. An averment, that the plaintiff was entitled to the use of a "public alley," is not supported by proof of a right to use a *private* alley. *Satchell v. Doram*, 543.
6. Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court trying the cause may require the prosecutor to elect upon which charge he will proceed; but the action of the court, in this respect, being a matter of discretion, can furnish no ground for a writ of error. *Bailey v. State*, 440.
7. Several distinct offenses may be joined in different counts of the same indictment, as a general rule, either where they arise out of, and are connected with, the same transaction, or where they are connected by the same subject-matter. *Ib.*
8. Where an indictment contained seven counts, and the verdict was not guilty upon the sixth and seventh counts, and guilty on the first, second, third, fourth, and fifth counts, the verdict is equivalent to a general verdict of guilty on the first five counts. *Ib.*
9. Where the defendant is found guilty upon several distinct counts of an indictment, some of which are bad and some good, a judgment and sentence in general terms, on such a verdict, is not erroneous, providing the sentence be proper, and warranted by the laws applicable to the good counts. *Ib.*
10. An information upon section 4 of the act to provide against the evils resulting from the sale of intoxicating liquors, is defective if it does not show that the place where the liquor was sold, was a place of public resort. This fact is sufficiently shown if the place is described as either a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, because each of these names is used in the act, and each of them does, *ex vi termini*, import a place of public resort. But it is otherwise if the place is merely called a "room;" for, although that word is also used in the act, it does not, *ex vi termini*, describe a place of public resort, and that it is so must be averred. *Aultfather v. State*, 467.

Policy of Insurance—Practice.

PLEADING—*Continued.*

11. An information upon section 2 of the act, is insufficient if it does not aver that the seller knew the buyer was a minor. *Ib.*
12. A complaint before a justice of the peace for a violation of section 4 *only*, does not authorize an information, in the probate court, upon any other section. *Ib.*
13. An information founded upon section 1 of the act to prevent the adulteration of alcoholic liquors (Swan's Rev. Stat. 479a), must contain the general allegation that the liquors sold were not inspected. *Woodworth v. State*, 487.
14. It is not sufficient to aver that they were not inspected in the county where sold, and that the cask containing them did not have the inspector's brand of any other county. *Ib.*
15. It is essential that an indictment for robbery should contain a substantial averment of the *intent to steal or rob*. *Matthews v. State*, 539.
16. And this averment is not sufficiently made by the words, "*feloniously did seize, take, and carry away*." *Ib.*
17. An information charging the defendant with selling intoxicating liquors to A, a person who then and for a long time had been in the habit of getting intoxicated, which habit was then and there well known to the defendant, ought not to be quashed upon the ground that the affidavit, upon which the defendant was arrested, did not state the defendant knew A was in the habit of getting intoxicated. *Parker v. State*, 563.
18. A count in an information charging B with selling intoxicating liquors, to be drank at the place where sold, will be sustained by proof that the liquor was sold by C, as the agent of B, and it is not necessary to aver, in the information, that it was sold by an agent. *Ib.*

POLICY OF INSURANCE. See INSURANCE.

POLICY, PUBLIC. See RESPONDEAT SUPERIOR; RAILROADS, 1.

POSTMASTER—

1. Section 10 of the act regulating the jurisdiction of justices of the peace, which provides "that justices shall not have cognizance in actions against justices of the peace, or *other officers*, for misconduct in office," includes postmasters. *Ford v. Parker*, 576.
2. When an action is brought against a postmaster for misconduct in office, and the damages claimed are less than \$100, such action may be commenced in the court of common pleas. *Ib.*
3. In such action, when the petition charges that a letter containing money was lost by the negligence of the postmaster, and the evidence introduced on the trial tends to prove that the letter containing the money reached the office of the postmaster, the plaintiff may prove, for the purpose of establishing the negligence, that the office was kept in an exposed situation, and that the servants and clerks of the postmaster, in a store in which the post-office was kept by the postmaster, had free access to the mail-matter in the office. *Ib.*

POWER. See PARTNERSHIP, 4, 5, 6: DEED, 4, 5.

PRACTICE—

1. A plaintiff can not sustain a motion to rule out the defendant's testimony, by evidence in reply to it. *Loudenback v. Collins*, 251.
2. He on whom the affirmative devolves, is bound to give all of his evidence in support of the issue, in the first instance; and he can only give such evidence in reply as tends to answer the new matter introduced by his adversary. *Graham v. Davis*, 362.
3. For any relaxation of this rule, the appeal is to the sound discretion of the court in which the issue is tried, and can not be reviewed on error. *Ib.*
4. Proceedings under the act of April 30, 1852, conferring upon the probate court jurisdiction in cases for the appropriation of private property to the use of certain corporations, may be instituted jointly against all the owners

Practice.

PRACTICE—Continued.

- of property, lying in the county, and sought to be appropriated; but after the return of the jury from the view, each owner of distinct property is entitled to a separate trial. *Giesy v. C., W. & Z. Railroad Co.* 308.
5. Two being jointly sued in the county where only one resides (the non-resident of that county being served in his own), if the defendant residing in and the defendant residing out of the first-mentioned county jointly plead to the merits, and the court find that they were not jointly liable, and nonsuit the plaintiff, it is error in the court to set aside the nonsuit, with leave to the plaintiff to strike out the name of the person residing in the county of the action, and proceed against the non-resident alone. *Dunn v. Hazlett*, 435.
 6. All jurors must have the qualifications of electors; and if one, not having such qualification, is retained upon the panel, without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain the fact when the jury is impeached, a new trial should be granted. *Eastman v. Wight*, 156.
 7. To lay a proper foundation for a new trial for such cause, it should be shown to the court, that the disqualification of the juror was unknown to the party and his counsel, and that reasonable diligence was used before the jury was sworn, by inquiry of the jury, or otherwise, to ascertain whether such objection to his sitting existed. *Ib.*
 8. To enable this court to review the judgment of the court below, overruling a motion for a new trial because the verdict is claimed to be against the evidence, it must appear, either expressly or by necessary implication, that the bill of exceptions contains all the evidence given by the jury upon the trial. *Ib.*
 9. *S. P., Youmans v. Caldwell*, 71.
 10. Under the provisions of the act regulating appeals to the district court (*Swan's Stat.* 717), one of two or more defendants, against whom *jointly* a judgment has been rendered in the common pleas, may appeal the case to the district court, and his appeal will vacate the judgment—its lien, however, being preserved—and take up the whole case. *Ewers v. Rutledge*, 210.
 11. To perfect the appeal in such case, it is not necessary for the appellant to give a bond that will cover the defaults of his co-defendant; it is sufficient if it cover his own. *Ib.*
 12. Section 92 of the justices' code (*Swan's Stat.* 514) does not make the payment of the jury fee a condition precedent to the rendition of judgment. If it be not paid, the justice may make an order that the successful party pay it, and enforce such order by an attachment; but he can not omit to give judgment because it is not paid. *Robinson v. Kiouss*, 593.
 13. Section 107 of the justices' code provides that "upon a verdict, the justice must immediately render judgment accordingly." This provision may not make a judgment, rendered upon a subsequent day, absolutely void, but it makes it irregular; and for such irregularity, when not waived, it is reversible. *Ib.*
 14. The common pleas, upon the reversal of such a judgment, must retain the cause for trial and final judgment. *Ib.*
 15. It must not be expected that the clerk of this court shall draft writs of mandamus. By the express provisions of the code, the writ and the answer thereto are pleadings, and the only pleadings in the case. The petition, or motion, upon which the writ issues, is no part of the pleadings. The writ must therefore be sufficient, *in itself*, to show precisely *what is claimed*, and the *facts upon which the claim is made*. To draft such a writ, generally requires time and legal skill, and also a knowledge of the case, which the clerk can not be required to obtain. Counsel must therefore prepare such writs, and submit them to the court, before they are issued, in order that it may be seen that they correspond with the order of allowance. *Johnes v. Auditor*, 493.

Presumptive Evidence—Promissory Notes.

PRACTICE—*Continued.*

16. See PROBATE COURT, 6, 7, 8; FORCIBLE ENTRY AND DETAINER; EQUITY, 7.
17. S. P., in effect, as in Nos. 6 and 7 of this title. *Parks v. State*, 204.
18. It is not essential that the record, of the conviction of a person of the crime of murder, should set out and show expressly that the grand jurors who returned the indictment, had the requisite qualification of electors of the county. *Ib.*
19. For the rule as to election, where several counts of an indictment charge different offenses, see INDICTMENT, 1, 2, 3. *Bailey v. State*, 440.
20. See COSTS.

PRESUMPTIVE EVIDENCE. See EVIDENCE 1, 2; PAYMENT; SATISFACTION; MORTGAGE, 13, 14.

PRINCIPAL AND AGENT. See PARTNERSHIP; RESPONDEAT SUPERIOR; CORPORATIONS.

PROBATE COURT—

1. Section 42 of an "act defining the jurisdiction and regulating the practice of probate courts," passed March 14, 1853, providing that, "upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the probate judges shall proceed to try the issue," is a valid and constitutional enactment. *Dailey v. State*, 57.
2. The act of April 30, 1852, conferring upon the probate court jurisdiction in cases for the appropriation of private property to the use of corporations authorized to construct public improvements, is a constitutional enactment. *Giesy v. C. W. & Z. Railroad Co.* 308.
3. Proceedings under that act may be instituted, jointly, against all the owners of property lying in the county and sought to be appropriated; but after the return of the jury from the view, *each* owner of distinct property is entitled to a separate trial. *Ib.*
4. The courts of probate in this state, by section 2 of the act of March 15, 1853, defining their jurisdiction and regulating their practice, were invested with power, upon final settlement with the administrator of an intestate estate, to order distribution of the money remaining in his hands, to the persons entitled thereto. *McLaughlin v. McLaughlin*, 508.
5. There exists no constitutional impediment to conferring such power upon that court. *Ib.*
6. In the exercise of this jurisdiction, the court is authorized to determine every disputed question of fact (or, in its discretion, to cause the same to be determined by the verdict of a jury), which may be necessary to ascertain the amount justly due from the administrator to such distributees. *Ib.*
7. Such order of distribution has so far the force and effect of a judgment, that it may be enforced by execution. *Ib.*
8. The powers of the court are exhausted when the order of distribution is made; and it has no jurisdiction to entertain a petition brought to enforce the collection of the amount awarded to the distributee, as a debt against the administrator. *Ib.*
9. See COSTS.

PROMISSORY NOTES—

1. S. & P., partners in trade, during the continuance of the partnership, became indebted to a third person for money borrowed, for which a promissory note was given in the name of the firm. After the dissolution of the partnership, and at the maturity of the note, S., in the name of the firm, executed a new note to the creditor, payable at a future day, with D. as surety, and which D. was ultimately compelled to pay. *Held*, that the dissolution of the partnership worked an absolute revocation of all implied authority in either of the partners to bind the other to new engagements, contracts, or promises, made to or with persons having notice of the dissolution, although springing out of, or founded upon, the indebtedness of the firm. *Palmer v. Dodge*, 21.

Promissory Notes.

PROMISSORY NOTES—*Continued.*

2. No such power could be inferred, from an authority given by one partner to the other, to settle, liquidate, and close up the affairs of the partnership. *Ib.*
3. Such liquidating partner had no power to extend the time for payment of the obligations of the firm, to increase their amount, or to obligate the firm to persons to whom it was not bound at the dissolution; and, therefore, that P. was not bound by the note given by S. after the dissolution, nor obligated to indemnify D. against the consequences of becoming security upon it. *Ib.*
4. A vendee of goods, subsequently to the purchase, gave his note for the price, but it was not received as payment. Afterward, the vendors, to whom it was payable, without any fraudulent purpose, and under an honest mistake of right, materially altered it. *Held*, that such alteration did not preclude a recovery upon the original cause of action, the precedent indebtedness. *Merrick v. Boury*, 60.
5. F. and others, sureties of C., signed an instrument payable to S. or order, in blank as to the date, amount, and time of payment, but with a private agreement that it should not be filled for more than \$1,000 or \$1,500, and delivered it to C., the principal, to procure the discount. While in the hands of C., seals were affixed to the signatures by some one, without the knowledge or consent of the sureties; and, subsequently, the instrument was presented by C. to S., the payee, and filled up and discounted for the sum of \$10,000. *Held*, that one who intrusts his name in blank to another to procure a discount, is liable to the full extent to which such other may see fit to bind him, when the paper is taken in good faith without notice, actual or constructive, that the authority given has been exceeded. *Fullerton v. Sturges*, 529.
6. Such blank signature has the effect of a general letter of credit; and the rule is founded as well upon that principal of general jurisprudence, which casts the loss, when one of two innocent persons must suffer, upon him who has put it in the power of another to do the injury; as also upon the rule of the law of agency, which makes the principal liable for the acts of his agent, in violation of his private instructions, when he has held the agent out as possessing more enlarged authority. *Ib.*
7. The material alteration of a written instrument, made by a stranger, will not avoid it. *Ib.*
8. To have that effect, the alteration must be made by, or with the privity of, one claiming a benefit under the instrument, and (to give application to the doctrines upon that subject) after the instrument has been delivered and taken effect. *Ib.*
9. In such case, a remedy is denied and the instrument is destroyed, as a punishment for the fraud of the party claiming a benefit under it.
10. In this case, C. was the authorized agent of F. to fill up the paper and procure the discount, having no title to, or interest in, the paper; and although not authorized to affix seals to the signatures, and, therefore, incompetent to bind F. thereby, his attempt to do so can not affect S., the payee. *Ib.*
11. Having fully executed and not exceeded his authority, by procuring the discount of the paper as a promissory note, his unauthorized act in affixing a seal may be treated as a nullity and the instrument enforced, in the manner and to the extent contemplated by the surety, as such promissory note. *Ib.*
12. In an action upon a note brought by the payee, for the use of his assignee, against the maker—the note having been assigned (but not indorsed) after due—and it not appearing that the payee was insolvent when he made the assignment, the maker can not set off money paid by him as surety for the payee, after he received notice of the assignment, although the money paid was upon a liability entered into before the assignment, but which had not

Property.

PROMISSORY NOTES—*Continued.*

been reduced into judgment against the surety before notice of the assignment was given. The maker had no demand upon the payee when he received such notice, but was only *contingently* liable for him. *Follett v. Buyer*, 586.

13. See EVIDENCE, 7; ACTION, 5 to 10.

PROPERTY—

1. The provision in section 19 of article 1 of the constitution, that "such compensation shall be assessed by a jury, without deduction for the benefits to any property of the owner," applies to all the cases mentioned in the section. *Lamb v. Lane*, 167.
2. The word "jury" in that section, as well as in the other places in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties. And they may be sent to inspect the premises. *Ib.*
3. No valid appropriation of property for public use can be made without a law providing compensation to the owner, to be assessed in the mode prescribed in the constitution. The constitution, in this particular, does not execute itself. *Ib.*
4. As there was no such law in existence, when the proceedings to condemn Lane's property for the use of a road took place, nor any waiver by him of his right to a jury trial, the proceedings were invalid. *Ib.*
5. An assessment may be made by viewers in the first instance, provided a right of appeal is given to a court in which they may be assessed by a constitutional jury. *Ib.*
6. The act of April 30, 1852, conferring upon the probate court jurisdiction in cases for the appropriation of private property to the use of corporations authorized to construct public improvements, is a constitutional enactment. *Giesy v. C., W. & Z. Railroad Co.* 308.
7. The general assembly possesses the constitutional power to confer upon a corporation, authorized to construct a railroad, the right to appropriate grounds necessary for its use for a *depot*. *Ib.*
8. The act of February 11, 1848, confers such right; and the act of 1852 is sufficiently comprehensive to give it effect, whether the proceeding is controlled by article 1, section 19, or article 13, section 5, of the constitution. *Ib.*
9. The power of *eminent domain* is not conferred by either of these sections; they simply prescribe modes for, and limitations upon, its exercise. *Ib.*
10. The power is an inseparable incident of sovereignty, and its exercise, for the accomplishment of lawful objects, is conferred upon the general assembly, in the general grant of legislative authority. *Ib.*
11. It may be used to appropriate lands for a public highway of any kind; and this whether the road is built and owned by the public, or by a corporation as a public instrumentality; provided it is kept open for public use, as a matter of right, or, according to the nature of the work, the corporation is made a common carrier of goods or passengers. *Ib.*
12. It may be exercised directly or indirectly by the general assembly, without the intervention of the judiciary, except for determining the amount of compensation. But the courts possess full power to determine its proper limits, and to prevent abuses in its exercise. *Ib.*
13. The power rests upon the public necessity, and can only be exercised where such necessity exists. *Ib.*
14. But this necessity relates rather to the nature of the property and the uses to which it is applied, than to the exigencies of the particular case; and it is no objection to the exercise of the power, that lands, equally feasible, could be obtained by purchase. *Ib.*
15. Only such interest as will answer the public wants can be taken; and it can be held only so long as it will be used by the public, and can not be diverted to any other purpose. *Ib.*

 Prosecution—Railroads.

PROPERTY—*Continued.*

16. The provisions of article 1, section 19. and article 13, section 5, of the constitution—the one requiring compensation to be made without *deduction* for benefits, when property is appropriated to a public use, and the other providing for compensation *irrespective* of benefits, where it is taken by a corporation for a right of way—are in legal effect, identical. *Ib.*
17. When taken under either section, its fair market value in cash, at the time it is taken, must be paid to the owner; and the jury, in assessing the amount, have no right to consider or make any use of the fact, that it has been increased in value by the proposal or construction of the improvement. *Ib.*
18. Under the Cincinnati charter, publication of an ordinance to appropriate land for a street, is sufficient notice to property-holders. *McMicken v. Cincinnati*, 394.
19. It is not necessary to provide, in the ordinance, for a review of the assessment of damages; it is time enough to provide for that when a review is asked. *Ib.*
20. The owner of land regularly appropriated to the use of a railroad company, in proceedings by the company under laws providing therefor, is barred by the common-law remedy. *Hueston v. Eaton and Ham. R. R. Co.* 685.
21. In such case, the bar is effectual, although the owner may have refused to submit to such proceeding, or to receive the amount awarded to him, and deposited for his use. *Ib.*
22. See BAR, 6; ACTION, 4.

PROSECUTION. See COSTS.

PUBLIC POLICY. See RESPONDEAT SUPERIOR, 7.

QUALIFICATION. See NEW TRIAL, 5; JURY, 6.

RAILROADS—

1. A railroad company agreed with certain contractors for the construction of a part of their road. Amongst other work provided for, was that of removing, at a stipulated price, solid rock, which, it was said in the contract, "must be removed by blasting." In removing such rock, without carelessness on the part of the contractors, a large quantity of fragments was thrown against the dwelling of an adjoining proprietor, causing an injury; for which he brought an action against the company. *Held*, that, in this case, the contractors had done only what they were authorized by the company to do; and as the company must be held to have assented to the unlawful act by which the plaintiffs were injured, it was liable as a joint wrong-doer. *Carman v. S. & I. R. R. Co.* 399.
2. In an action to recover damages against a railroad company, for the destruction of horses which were on the track of the railroad when killed, evidence was given tending to prove an obligation resting upon the owner of the land, where the horses were pastured, to fence it from the railroad track; and that in consequence of the failure, the horses had strayed upon the track. The court charged the jury, in effect, that the company would be liable for the negligence of its officers and agents, as though the horses were running at large, or no such obligation existed. In this charge there was error. *C. H. & D. Railroad Co. v. Waterson & Kirk*, 424.
3. The company had the right to protect itself against the inconvenience and hazard of using an unfenced road. *Ib.*
4. After devolving the obligation to do this upon the owner of the land, he could not, over the breach of his contract, suffer his animals to go upon the road without being liable for their trespass. *Ib.*
5. In such case, he would be a wrong-doer, and not entitled to demand the same degree of care as though he did not occupy that position. *Ib.*
6. If the company had succeeded in establishing this fact, they could not have been charged short of proof of intentional injury, or of that gross careless-

 Recoupment—Respondeat Superior.

RAILROADS—*Continued.*

- ness, involving a recklessness of consequences, which it is so difficult to distinguish from intentional wrong. *Ib.*
7. Suffering domestic animals to run at large, by means whereof they stray upon an uninclosed railway track, where they are killed by a train, is not, in general, a *proximate* cause of the loss; and hence, although there may have been some negligence in the owner's permitting the animals to go at large, such negligence being only a *remote* cause of the loss, it will not prevent his recovering, from the railroad company, the value of the animals, if the *immediate* cause of their death was negligence of the company's servants in conducting the train. *C. C. & C. R. R. Co. v. Elliott.* 476.
 8. The bare fact that a railway is uninclosed, there being no statute requiring it to be fenced, does not, in general, render the railroad company liable to pay for animals straying upon the track and killed by a train—such want of fencing being, in general, only a remote cause of the loss. *Ib.*
 9. The paramount duty of a conductor of a train is to watch over the safety of the persons and property in his charge; subject to which, it is his duty to use reasonable care to avoid unnecessary injury to animals straying upon the road. *Ib.*
 10. The owner of land, regularly appropriated to the use of a railroad company, upon proceedings instituted by the company under laws providing therefor, is barred of the common-law remedy, to sue for and recover the damages he may have sustained by the entry of the company, and the construction of their road upon such land. *Hueston v. Eaton and Ham. R. R. Co.* 685.
 11. In such case, the bar is equally effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him, and deposited for his use. *Ib.*
 12. See RESPONDEAT SUPERIOR.

RECOUPMENT—

1. In an action brought for the purchase price of personal property, it is competent for the defendant, upon giving notice of his intention to do so, to *recoup* against the plaintiff's claim, any damages he may have sustained by fraud in the sale, or breach of warranty. *Timmons v. Dunn*, 680.
2. Such a proceeding is in the nature of a cross-action, and governed by the same principles. *Ib.*
3. When the controversy is between the original parties to the contract, it makes no difference that a note or bond was given for the purchase price. *Ib.*
4. If the defendant elects to present his claim in this form, a decision for or against him is a bar to another action. *Ib.*

RESERVATION. See LEASE.

RESPONDEAT SUPERIOR—

1. Municipal corporations are liable for injuries to third persons, resulting from the negligence of subordinate officers or agents acting under their authority and direction, in the construction of public improvements belonging to such corporations. *Dayton v. Pease*, 80.
2. In such cases, the maxim *respondeat superior* properly applies, in the same manner and to the same extent, as in its application to the liabilities of private individuals. *Ib.*
3. But where such agent or officer, although appointed by the corporation, performs duties for or between individuals, in which the corporation has no interest, no such liability arises, and the officer alone is responsible. *Ib.*
4. A railroad company agreed with certain contractors for the construction of a part of their road. Amongst other work provided for, was that of removing, at a stipulated price, solid rock, which, it was said in the contract, "must be removed by blasting." In removing such rock, without carelessness on the part of the contractors, a large quantity of fragments was thrown against the dwelling of an adjoining proprietor, causing an injury;

Reversion—Roads.

RESPONDEAT SUPERIOR—Continued.

for which he brought an action against the company. *Held*, that the maxim *respondet superior* does not apply to the case of employer and contractor, where the latter executes an independent employment. *Carman v. S. & I. R. R. Co.* 399.

5. But whether the owner of real property can escape liability, when such a contractor uses his property so as to become a nuisance to adjoining proprietors—*quare. Ib.*
6. That before a case can be made for the application of the principle expressed in this maxim, not only the relation of master and servant must have existed, but it must appear that the servant, while engaged in the business of the master, has done some act, or omitted some duty, neither directed nor authorized by the master, to the injury of a third person. *Ib.*
7. In such case, the master, upon grounds of public policy, is liable for the negligence or carelessness of his servant. *Ib.*
8. That, in this case, the contractors had done only what they were authorized by the company to do; and as the company must be held to have assented to the unlawful act, by which the plaintiffs were injured, it was liable as a joint wrong-doer. *Ib.*
9. W. requested his hired man G. to assist him in placing certain railroad cars and trucks—which he had sold, and agreed to ship from Cleveland to Toledo—on a vessel; to do which it was necessary to raise them from the dock by the use of machinery and manual effort. G. consented. The work was to be done the next day, which was Sunday, November 15th, as the vessel was about to sail, and her master would not take the cars, etc., unless shipped on that day; and “it was a matter of great necessity that they should be shipped as speedily as possible, as navigation was about closing.” While raising one of the trucks, a part of the machinery gave way, owing to which the truck fell upon G., breaking both his legs. To recover damages for this injury, he brought this suit, charging that it was owing to W.’s neglect that the machinery was insufficient. A verdict being rendered for G., a new trial was moved for by W. *Held*, that if W. had no charge of, or control over, the operation of shipping the cars, etc., but, on the contrary, the duty of shipping them rested solely upon the master of the vessel, and he had the entire control over the operation, and W. was acting merely as his assistant or servant, the action should have been brought against the owner of the vessel, and not against W. *McGatrick v. Wason*, 566.
10. But if it was W.’s duty to ship them, or if it was the joint duty of him and the master of the vessel, he was (as between him and G.) liable for the injury, if it resulted from his neglect, or that of the master of the vessel, to provide suitable machinery, the defect in the machinery being unknown to G. The general rule is, that an employer who provides the machinery and oversees and controls its operation, must see that it is suitable; and if an injury to the workman happen by reason of a defect, unknown to the latter, and which the employer by the use of ordinary care could have cured, such employer is liable for the injury. *Ib.*

REVERSION. See DAMAGES.

REVIEW. See COURTS, 2, 3, 4; EQUITY.

RIGHT OF PROPERTY, TRIAL OF. See BAR, 6; ACTION, 4.

ROADS—

1. The statutory provisions authorizing the establishment of township roads, do not contravene the constitutional provision, that “private property shall ever be held inviolate, but subservient to the public welfare.” *Shaver v. Starrett*, 494.
2. A township road is as subject to public travel, and as free and open to every individual, as any other road in the state. *Ib.*
3. But the statute is fatally defective in this, that it makes no provision for a

Robbery—School Teacher.

ROADS—Continued.

jury, in the proper sense of the term, to assess the damages of the property-holder. *Lamb & McKee v. Lane*, affirmed. *Ib.*

ROBBERY. See **INDICTMENT**, 5, 6.

SABBATH. See **SUNDAY**.

SATISFACTION—

J. D. being indebted to T. for the purchase money of certain real estate, gave him several notes, and a mortgage upon the property, to secure them. Soon after the execution of the mortgage, J. D. conveyed the land, subject thereto, to other persons. After some of the notes had fallen due, T. recovered a judgment at law upon them against J. D.; and in ignorance of the conveyance levied upon, bid off, and took a deed of the mortgaged premises, in satisfaction of the judgment. Upon a bill filed upon the mortgage, by the assignee of T. against J. D. and his grantees—

1. *Held*, that the sale of the property upon the judgment at law, was no defense to this suit, and did not operate as a payment of any part of the debt secured by the mortgage. *Hollister v. Dillon*, 197.
2. That whether a court of equity has, or has not, the power to vacate the satisfaction of a judgment, and open it for further process, because the purchaser, under a mistake, bid off property to which the debtor had no title, it will not permit such a sale to prejudice a party, in a case over which it has unquestioned jurisdiction. *Ib.*

3. See **BASTARDY**.

SCHOOL LANDS—

1. It may be that, under the acts of Congress of April 30, 1802, and March 3, 1803 (2 Stat. at Large, 173, 225; 1 Chase, 72-74), it was not necessary that a survey, even into townships, should have been made, in order that the title to section 16 should vest in the state. *Coombs & Ewing's Lessee v. Lane*, 112.
2. But it is not clear that it was designed, by these acts, to appropriate section 16, specifically, within the bounds of the "donation tract," for school purposes. It seems most likely that that tract was considered as falling within the denomination of lands "granted or disposed of," referred to in the act of 1802; and that, therefore, not section 16, but, in the language of the act, "other lands equivalent thereto," were intended as the school lands of this tract. *Ib.*
3. The "donation tract" was not required to be divided into sections by the act of Congress of May 10, 1800. (2 Stat. at Large, 73.) That act required such lands *only* to be surveyed, or subdivided, as the previous act of May 18, 1796 (1 Stat. at Large, 464), directed to be sold. But no part of the "donation tract" was ordered to be sold by this latter act. Besides, there are provisions in the act of 1800, that forbid its application to the "donation tract." *Ib.*
4. There was ample authority, under the acts of Congress of 1803, aforesaid, and 1818 (3 Stat. at Large, 409), to select school lands for the "donation tract." *Ib.*
5. Under the provisions of the acts aforesaid, of 1802 and 1803, every township, *fractional or entire*, containing a section 16, was entitled to it for school purposes, if undisposed of; if disposed of, then to its equivalent. *Ib.*

SCHOOL TEACHER—

The board of education of a township, acting upon the supposition that the local directors of a subdistrict were neglecting to discharge their duties, assumed the exercise of those duties, under the provision of section 13 of the school law, and employed a teacher for said subdistrict; who, under that retainer, and without being notified by the local directors to desist, taught the school in said subdistrict for three months, and at the expiration thereof received from the clerk of the board of education an order upon

Section 16—Statutes Construed, etc.

SCHOOL TEACHER—Continued.

the township treasurer for his wages, pursuant to section 24 of said act: *Held*, that the treasurer could not rightfully withhold payment of said order, upon the ground that the local directors had not been neglectful of their duties, and that the exercise thereof, by the board of education, was unwarranted by the facts of the case. *Case v. Wresler*, 561.

SECTION 16. See **SCHOOL LANDS**.

SET-OFF. See **PROMISSORY NOTES**, 12.

SHERIFF. See **OFFICE AND OFFICERS**.

SPECIFIC PERFORMANCE. See **DEED**, 2, 3; **MORTGAGE**, 5.

STANDING CORN. See **LEASE**.

STATUTES CONSTRUED, ETC.—

1. (Record of mortgages.) Section 7, act June 1, 1831. *Bloom v. Noggle*, 52; *Sidle v. Maxwell*, 239.
2. (Same.) Declaratory act March 16, 1838. *Bloom v. Noggle*, 52; *Sidle v. Maxwell*, 239.
3. Mechanic's lien law. *Dutro v. Wilson*, 111.
4. Act of Congress, April 30, 1802, to enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and state government, etc., 2 Stat. at Large, 173; 1 Chase, 72. *Coombs' Lessee v. Lane*, 150.
5. Act of Congress of March 3, 1803, 1 Chase, 72-74; 2 Stat. at Large, 225. *Ib.*
6. Act of Congress of April 21, 1792, 1 Stat. at Large, 258; *Swan's Land Laws*, 21. *Ib.*
7. Act of Congress, March 18, 1818, 3 Stat. at Large, 409; *Swan's Land L.* 24. *Ib.* 151.
8. Act of Congress, May 10, 1800, 2 Stat. at Large, 73. *Ib.*
9. Act of Congress, May 18, 1796, 1 Stat. at Large, 464. *Ib.*
10. Act of Congress, May 20, 1826. *Ib.* 152.
11. Ordinance of May 20, 1785. *Ib.* 154.
12. Ordinance of July 23, 1787. *Ib.*
13. Ohio (road) act of March 25, 1851, 2 Curw. 1672. *Lamb v. Lane*, 178.
14. Act on same subject, of——. *Lamb v. Lane*, 167.
15. Act regulating appeals, *Swan*, 717. *Ewers v. Rutledge*, 213.
16. Act on the same subject, of 1831, *Swan's old Stat.* 682. *Ib.* 216.
17. Limitation act (ejectment). *Thompson's Lessee v. Green*, 216; *Ford's Lessee v. Langel*, 465.
18. Act of July 4, 1846, in relation to the interests of husbands in the estate of their wives. *Ib.* 232.
19. Section 98 of administration act. *Haymaker v. Haymaker*, 278.
20. Limitation act of June 1, 1831 (*Swan's old Stat.* 555, sec. 6), as to effect of nonsuit. *Ib.* 279.
21. Section 45 of administration act (as to widow's allowance). *Dorah v. Dorah*, 294.
22. Act to provide for the construction of a road from the Maumee of Lake Erie to the Western Reserve, passed February 25, 1824, and the act amendatory thereof, passed February 7, 1825; with the act of January 29, 1833, directing the governor to execute a deed to the heirs of Ebenezer Roseberry. *Roseberry v. Hollister*, 301.
23. Section 8 of registry act. *Swan's old Stat.* 276. *Ib.* 304.
24. Act of April 30, 1852 (for appropriation of lands to corporations), *Swan's Rev. Stat.* 232. *Giesy v. C. W. & Z. Railroad Co.* 318.
25. Act incorporating C. W. & Z. Railroad Company, 49 Ohio L. L. 424. *Ib.* 323.
26. Section 9 of general railroad act of February 11, 1848, 2 Curw. Rev. Stat. 1396. *Ib.*
27. Section 12, act of 1841 (as to bastards). *Lewis v. Eustler*, 355, 356.

Statutes Construed, etc.

STATUTES CONSTRUED, ETC.—*Continued.*

28. Act of March 14, 1853, regulating descents and distribution of personal estates, 3 Curw. Rev. Stat. 2270. *Ib.* 358.
29. Act of February 8, 1847 (escheats), 2 Curw. Rev. Stat. 1342. *Ib.* 361.
30. Section 12, wills act of May 3, 1852. *Matter of Hathaway's Will*, 384.
31. Section 7, practice act of 1831 (Swan's old Stat. 652). *Dunn v. Hazlett*, 437.
32. Section 4 of the act to provide against the evils resulting from the sale of intoxicating liquors. *Aultfather v. State*, 467.
33. Section 2 of the same act. *Ib.*
34. Section 5 of the act of January 31, 1854 (52 Ohio L. 10), providing for "additional terms" of common pleas. *Harris v. Gest*, 473.
35. Section 1, act of May 1, 1854, "to prevent the adulteration of alcoholic liquors," Swan's Rev. Stat. 479a. *Cheadle v. State*, 478; *Woodworth v. State*, 488.
36. Section 45, probate court code (costs). *Sovereign v. State*, 491.
37. Township road law (now repealed). *Shaver v. Starrett*, 498.
38. Practice act of 1831, as to writs of error. *Schooner Marinda v. Dowlin*, 501.
39. Code, sections 523, 530, 533, 602, 606, 610. *Ib.*
40. Section 6 and section 8 of same. *Ib.*
41. Section 2, act of March 15, 1853, defining the jurisdiction and regulating the practice of probate courts. *McLaughlin v. McLaughlin*, 508.
42. Amendatory act of 1854, on the same subject. *Ib.* 511.
43. Act to improve the law of evidence, 2 Curw. 1522. *Stober v. McCarter*, 517.
44. Code, section 314. *Ib.* 524.
45. Forcible entry and detainer act of 1831, Swan's Stat. (old ed.) 419, 420. *Aubrey v. Almy*, 527.
46. Section 15 of crimes act (robbery). *Matthews v. State*, 540.
47. Act relating to bond of county treasurer. *State v. Tool*, 528.
48. Section 13 of school law, Swan's new Stat. 839. *Case v. Wresler*, 562.
49. Liquor law (sale to persons in habit of getting intoxicated). *Parker v. State*, 564.
50. Same (sale by agent). *Ib.*
51. Sunday act, Swan's new Stat. 302. *McGatrick v. Wason*, 571.
52. Section 10, justices' act, Swan, 502. *Ford v. Parker*, 582.
53. Section 6 of the act regulating the proceedings in appropriations of lands to railroad use (Swan, 233). *Atlantic & G. W. R. R. Co. v. Campbell*, 585.
54. Section 310 and section 311 of code. *Ib.*
55. Section 3 of the act relating to negotiable instruments, Swan's new Stat. 575. *Follett v. Buyer*, 590.
56. Sections 92, 107, justices' code, Swan's new Stat. 514, 516. *Robinson v. Kious*, 595.
57. Section 532 of the code. *Ib.* 597.
58. Act relating to trial of right of property, Swan's Rev. Stat. 676. *Abbey v. Searls & Rider*, 598.
59. Act allowing surety certain remedies against principal, Swan's old Stat. 878, sec. 5. *Hale v. Wetmore*, 600.
60. Sections 533 and 602, code. *Hale v. Wetmore*, 601; *Longworth v. Sturges & Anderson*, 716.
61. Act of March 14, 1838, relating to assignments of property by insolvent debtors (Swan's Stat. 717). *Bloom v. Noggle*, 45; *Harkrader v. Leiby*, 607.
62. Section 15 and section 16, chancery practice act of 1831, Swan's Stat. (old ed.) 704. *Bowry v. Odell*, 626.
63. Amendatory act of 1818, 46 Ohio L. 96. *Ib.*
64. Bastardy act—as to accord and satisfaction. *Perkins v. Mobley*, 672.
65. The several statutes relating to bills of review. *Longworth v. Sturges & Anderson*, 717 *et seq.*

 Sunday—Widow.

SUNDAY—

1. Legally considered, our Sunday act is merely a civil regulation, having no connection with religion, and founded on principles of public policy alone. And the same policy that dictated the prohibitions it contains, also dictated its exception therefrom, of "works of necessity and charity." *McGatrick v. Wason*, 566.
2. Works of necessity, within the meaning of the act, are not limited to labor for the preservation of life, health, or property from impending danger. The necessity may grow out of, or indeed be incident to, the general course of trade or business, or even be an exigency of a particular trade or business, and yet be within the exception of the act. Hence the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so. *Id.*

SURETY—

1. The sureties in the official bond of a justice of the peace, conditioned that the officer should well and truly pay over, according to law, all moneys that might come into his hands, by virtue of his commission, are liable, upon failure of the personal representative of the officer, after his death, to pay over, upon demand, moneys that came into his hands officially during his term of office. *Peabody v. State*, use, etc. 387.
2. See PROMISSORY NOTES, 5, 10, 11.
3. A surety against whom judgment has been rendered, may, without making payment himself, proceed in equity, against his principal, to subject the estate of the latter to the payment of the debt. *Swan's Stat.* (old ed.) 878, sec. 5. *Hale v. Wetmore*, 600.

SURVIVING PARTNER. See PARTNERSHIP.

SURVEY. See SCHOOL LANDS.

TITLE DEEDS. See ASSIGNMENT, 1; MORTGAGE, 1.

TOWNSHIP ROADS. See ROADS.

TREASURER—

Where a treasurer elect, on the first Monday of June next after the election, executed and delivered a bond to the commissioners of the county with sufficient surety, according to the statute, and the commissioners on that day neither accepted nor rejected the bond, but on the next day approved it, and the treasurer immediately thereafter took the necessary oath, and had the same indorsed on the bond, he thereby became the legal treasurer of the county. *State ex rel. v. Tool*, 553.

TRIAL BY JURY. See JURY; WAIVER.

TRUST. See WILL.

VENUE AND VENDEE. See DEED; PARTNERSHIP.

VERDICT. See INDICTMENT, 1, 2, 3, 4; NEW TRIAL.

VIEW. See PROBATE COURT and RAILROADS.

WAIVER—

A record of the probate court, showing that the accused "did not demand a jury," sufficiently shows a waiver of trial by jury. *Dailey v. State*, 57.

WIFE. See EVIDENCE, 14.

WIDOW—

1. The death of a widow, to whom an allowance has been made under sections 45 and 46 of the administration law, before the expiration of the year, and before it has all been expended in her support, does not bar the right of her executor to recover the amount unpaid, from the executor of her husband. *Dorah v. Dorah*, 292.
2. Such allowance confers a vested right of property, and is not divested by her death, or by any other contingency, occurring after the amount has been fixed and allowed by the proper tribunal. *Id.*

Will—Witness.

WIDOW—*Continued.*

3. Whether, upon petition for such cause, the amount might be diminished by the probate court, under section 48—*quære. Ib.*

WILL—

1. A will is to be construed in the light afforded by the circumstances under which it was made, and the subjects to which it relates. *Thompson v. Thompson*, 333.
2. And its terms are not, of necessity, to be construed technically and with a strict reference to grammatical accuracy, but sensibly and liberally, in order to give effect to the testator's intentions. *Ib.*
3. Nor is it to be so construed as to destroy all benefit from a devise, if it can consistently be avoided. *Ib.*
4. A testator may, by an express direction in his will, charge his personal estate with the removal of an incumbrance upon his realty, although not personally bound for the debt; or he may do so by dispositions and language that are tantamount to an express direction; as, where the continuance of the charge primarily on the land would be repugnant to some of the provisions of the will and defeat them. In this, as in other cases, the principal object of regard is the testator's intention. *Ib.*
5. A. S., by his will, devised all his real and personal property, subject to the payment of his debts and the support of his widow, to M. S., and directed him to pay a specific amount of money to each of his other children. M. S., after accepting the devise and taking possession of the property, sold the real estate to one having notice that the legacies were not paid, and that the purchase money was not to be applied to their payment. *Held*, that the legacies were a subsisting charge upon the property. *Clyde v. Simpson*, 445.
6. Express words are not necessary to charge pecuniary legacies upon the real estate. An intention to do so may be derived by implication. *Ib.*
7. But where a devise is not directed to pay such legacies, and they are sought to be charged upon the property devised, on failure of the personal fund, or in exoneration of that fund, the language of the will must be so explicit as to enable the court to see clearly that the testator contemplated such charge, and intended to provide for it. *Ib.*
8. If the devisee is required to pay them, as a part consideration for the property, the law attaches an equitable lien for the security of the legatees, unless it clearly appears that the testator intended to exonerate the property from the charge. *Ib.*
9. In the one case, the burden can not be established without a clear conviction that the testator intended it; in the other, the burden being express, the charge will exist, unless it appears with equal distinctness, that the testator intended otherwise. *Ib.*
10. A devisee in trust, or subject to such a charge, has the power to sell the estate. *Ib.*
11. But where the trust or charge is of a defined and limited nature, the purchaser must see to the application of the purchase money; otherwise, when it is general and unlimited. *Ib.*
12. In either case, when the purchaser has notice that the devisee is committing a breach of trust, or that the purchase money is not to be properly applied, he will be compelled to hold the property subject to charge. *Ib.*

WITNESS. See EVIDENCE, 14, 15, 16, 17, 19.

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